Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

DARREN MCBROOM, TERRY FINK, RANDY HEIDLE, VIRGIL MCCARTER and JERRY SINGLETON,
Petitioners,

v.

RALPH MOORE, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the "course of proceedings" test, as adopted by the Sixth Circuit and used in other Circuits, in determining whether a governmental employee is being sued in his individual or official capacity, effectively abandons the doctrine of qualified immunity, which mandates that a determination of the applicability of the defense be made at the earliest possible stage of litigation?

Whether the "course of proceedings test" is inconsistent with jurisdictional requirements of the Eleventh Amendment which requires the district court to determine at the outset of litigation whether it has the requisite jurisdiction?

Whether the "course of proceedings test" is patently unfair and contra to Federal Rule of Civil Procedure 8(a) and 9(a) in that it requires a defendant to determine the subjective intent of the plaintiff, rather than requiring the Plaintiff to plead with specificity?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Darren McBroom, Terry Fink, Randy Heidle, Virgil McCarter and Jerry Singleton, individual citizens of the United States, residing in the Eastern District of Tennessee. The petitioners were officers of the Harriman, Tennessee Police Department, and were Defendants in the District Court, and Appellees in the Court of Appeals for the Sixth Circuit.

Respondent

Respondent is Ralph Moore, Jr., an individual citizen of the United States, residing in the Eastern District of Tennessee. The Respondent was the Plaintiff in the District Court, and the Appellant in the Court of Appeals for the Sixth Circuit.

No corporate party is involved in this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *en banc* (App. 1a) is reported at 272 F.3d 769.

The Order vacating the panel's decision of the Court of Appeals (App. 75a) is reported at 218 F.3d 555.

The vacated opinion of the court of appeals (App. 77a) is reported at 218 F.3d 551.

The opinion of the district court (App. 89a) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion and order on November 8, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983 (App. 96a)

2. Fed. R. Civ. P. 8(a)

3. Fed. R. Civ. P. 9(a)

The pertinent portion of Rule 8(a) of the Federal Rules of Civil Procedure provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross claim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

The pertinent portion of Rule 9(a) of the Federal Rules of Civil Procedure provides:

(a) Capacity. It is not necessary to aver the capacity to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

STATEMENT OF THE CASE

On April 7, 1996, Respondent, Ralph Moore, Jr., hereinafter "Moore," was arrested at his residence on charges of disorderly conduct, aggravated assault on a police officer,

simple assault on a police officer, resisting arrest, and contributing to the delinquency of a minor.

On April 4, 1997, Moore, through counsel, filed a Complaint in the U.S. District Court for the Eastern District of Tennessee, alleging that his civil rights were violated as a result of his arrest, and for various state law claims. Moore filed suit against the City of Harriman, Tennessee, the Harriman Police Department[1], Roy Jenkins, the chief of Police, and the petitioners, Darren McBroom, Terry Fink, Randy Heidle, Virgil McCarter and Jerry Singleton.[2] The petitioners were, at the time, all members of the Harriman Police Department, although not all were involved in Moore's arrest. The capacity of the officers was not specified.[3] The Caption of Plaintiff's Complaint was as follows:

> Ralph Moore, Jr.
> 521 Sheldon Rd.
> Harriman, TN 37748
>
> Plaintiff
>
> vs.
>
> City of Harriman, Tennessee, Harriman Police Department, Roy Jenkins, Chief of Police, Darren McBroom, Terry Fink,

[1] As a department of the City, the Harriman Police Department is not an entity capable of being sued.

[2] The petitioners will hereinafter be referred to as "the officers" or by name, where appropriate.

[3] The entire Complaint is set forth as an appendix to the opinion below, and is therefore found in this Petition at App. 67a.

Randy Heidle, Virgil McCart [sic], and Jerry Singleton
Harriman Police Department
302 Roane St.
Harriman, TN 37748

Defendants

The Caption of the Complaint does not specify whether McBroom, Fink, Heidle, McCarter and Singleton are being sued in their individual or official capacities. The Caption does not list the officer's individual addresses, but lists their addresses as the Harriman Police Department.

Paragraph 1 of the Complaint identifies the parties, and reads in pertinent part:

> 1. **Parties**. The parties are identified as follows:
>
> * * *
>
> c. The defendant Jenkins was at all times relevant to this action the Chief of the City of Harriman Police Department and as such was responsible for the hiring, training, supervision and/or control of the officers in the Harriman Police Department. *The other individual defendants were at all times relevant to this action* ***officers of the City of Harriman Police Department and were acting in the course and scope of their employment and in furtherance of the business of the***

> ***City. At all times relevant hereto the said defendants were acting under color of Tennessee law, and in the Eastern District of Tennessee.***

(emphasis added). Paragraph 4 of the Complaint sets out the actions Moore alleges to have occurred during his arrest on April 7, 1996. McBroom, Fink, Heidle, McCarter and Singleton are all referenced by name and as "officers." Paragraph 4 also states that they are "all City of Harriman police officers," and refers to Officer McBroom as "the defendant officer McBroom."

Paragraphs 5 through 16 refer to the officers fourteen times as "the said officers," one time as "the officers," and one time as "the individual defendants."

Paragraph 15 of the Complaint states that the actions of the officers were taken as part of their official duties:

> At all times relevant to this action, the said officers were employees and/or agents of the City of Harriman. ***All of the said actions of the said officers were taken in the course of and in the scope of their employment by the City***, for which the City and the defendant police chief Jenkins are liable vicariously, according to the principles of *respondeat superior.*

(emphasis added).

The prayer for relief asks the Court to award compensatory and punitive damages against "each of the

defendants," but does not individually specify in what capacity they are being sued.

At no place in the Complaint is the term "individual capacity" or "individual liability" used. The Complaint was signed by two attorneys.

The officers did not file individual answers. Rather, an Answer was filed on March 14, 1997, on behalf of the "Defendant City of Harriman and its employees."

The Answer admitted that McBroom, Fink, Heidle, McCarter and Singleton "were acting in the course and scope of their employment as police officers of the City of Harriman and in the furtherance of the business of the City." Since the Officers did not view the Complaint as naming them in an individual capacity, the defense of qualified immunity was not raised.

The City filed a Motion to Dismiss the Officers on January 22, 1998, on the grounds that they were unnecessary parties in that the Complaint also named the City of Harriman, Tennessee, and that Moore had not named them in their individual capacities. Pursuant to the District Court's scheduling Order, Moore had until February 9, 1998 to amend his pleadings. Moore did not amend the Complaint to name the individual officers, but instead responded to the Officers' Motion on February 11, 1998. The District Court granted the Motion to Dismiss the Officers on February 27, 1998. Trial of the matter was at that time set for May 20,

1998.[4] On March 6, 1998, after the Court had already dismissed the Officers, and after the time for filing amended pleadings had passed, Moore moved for leave to amend his Complaint, to insert an allegation that the officers were being sued in their individual capacities. The District Court denied that Motion.

The City of Harriman later moved for summary judgment, which was granted, and Plaintiff filed a Notice of Appeal on February 22, 1999, appealing only the decision to dismiss the federal causes of action against the officers, and the District Court's decision not to allow him to amend his Complaint.

A panel of the Court of Appeals for the Sixth Circuit overturned the District Court's decision on July 6, 2000. The officers moved for a rehearing *en banc*, which was granted, and the panel's decision was withdrawn on September 12, 2000. The full court issued an opinion on November 8, 2001, with five judges voting and two concurring to overturn the District Court, and adopt a "course of proceedings" test to determine individual capacity in civil rights cases. Six judges dissented.

---

[4] In the Court below, the majority opinion assumes that these events occurred at "a relatively early stage of litigation" given that the Officers had filed a Rule 12(b)(6) Motion. 272 F.3d 769, 772 n. 1. In actuality, as noted by the Dissent, Moore first moved to amend his complaint on the eve of trial, thirteen months after the Complaint was filed. See 272 F.3d 769, 797.

REASONS FOR GRANTING THE WRIT

THE COURSE OF PROCEEDINGS TEST TO DETERMINE WHETHER A LAWSUIT IS AN "OFFICIAL" CAPACITY OR "INDIVIDUAL" CAPACITY CASE IS INCONSISTENT WITH THE DOCTRINE OF QUALIFIED IMMUNITY, IS INCONSISTENT WITH THE JURISDICTIONAL REQUIREMENTS UNDER THE ELEVENTH AMENDMENT, AND IS UNFAIR TO DEFENDANTS IN THAT IT REQUIRES THEM TO ASCERTAIN THE SUBJECTIVE INTENT OF THE PLAINTIFF.

This case presents the opportunity for this Court to address the conflict among the circuits regarding the specificity required of a Plaintiff in a civil rights case in naming a governmental employee in an official or individual capacity context, to determine whether the course of proceedings test applied in several circuits, and adopted by the Sixth Circuit in this case, conflicts with the doctrine of qualified immunity, is inconsistent with federal court jurisdictional mandates under the Eleventh Amendment of the United States Constitution, and to specify that the burden is on the plaintiff in specifically naming capacity, rather than on the defendant government employee and the court to infer capacity when it is not stated.

Although this Court has previously noted the split of authority in the Circuits regarding the pleading requirements for § 1983 claims, it has not yet addressed the issue presented in this case. In Hafer v. Melo, 502 U.S. 21, 24, n.*, 112 S.Ct. 358, 361 (1991), the Court noted the issue and commented that "[b]ecause it is not properly before us, we simply reiterate the Third Circuit's view that '(I)t is obviously preferable for the plaintiff to be specific in the first instance

to avoid any ambiguity.'" 502 U.S. at 24, n.* (internal citations omitted). Several circuits had adopted the "course of proceedings" test prior to the Sixth Circuit adopting it in this case. See Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996); Biggs v. Meadows, 66 F.3d 56, 60 (4th Cir. 1995); Ying Jing Gan v. City of New York, 996 F.2d 522, 529-30 (2d Cir. 1993); Hill v. Shelander, 924 F.2d 1370, 1373-74 (7th Cir. 1991); Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991); Melo v. Hafer, 912 F.2d 628, 635 (3d Cir. 1990); Lundgren v. McDaniel, 814 F.2d 600, 604 (11th Cir. 1987) Parker v. Graves, 479 F.2d 335, 336 (5th Cir. 1973). Before this case, the Sixth Circuit did not recognize the course of proceedings test. See Wells v. Brown, 891 F.2d 591 (6th Cir. 1989). There are now two circuits that do not recognize the course of proceedings test. See Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) (official liability is presumed absent express statement that suit is brought against defendant in individual capacity); Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho, 42 F.3d 1278, 1284 (9th Cir. 1994) (individual liability presumed when complaint seeks monetary damages from state officials).

I. The Decision Below Conflicts With The Holding Of This Court And Other Circuits That Qualified Immunity Is To Be Determined At The Earliest Possible Stage Of Litigation.

The doctrine of qualified immunity provides an immunity not just from liability, but an "immunity from suit." Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985).

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a

> case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

Id. at 526-27, 1055 S.Ct. at 2815-2816 (emphasis in original).

Qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation." Mitchell, 472 U.S. at 526, 105 S.Ct. at 2815. "[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." Harlow v. Fitzgerald, 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2738 (1982). Qualified immunity is designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Id. at 818. This Court has "repeatedly ... stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 536 (1991) (*per curiam*).

Indeed, in cases where qualified immunity is an issue, the Plaintiff actually has a heightened pleading burden. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell, 472 U.S. at 526, 105 S.Ct. at 2815 (citing Harlow, 457 U.S. at 818, 102 S.Ct. at 2737). "Until this threshold immunity question is resolved, discovery should not be allowed." Harlow, 457 U.S. at 818, 102 S.Ct. at 2738.

The importance of resolving qualified immunity early in the litigation was reiterated by this Court in the recent case of Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001).

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? **This must be the initial inquiry.** *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

121 S.Ct. at 2156 (emphasis added).

Under the course of proceedings test, however, the district court cannot make an initial inquiry as to whether "the facts alleged show the officer's conduct violated a constitutional right," because the officers would not, as in this case, have a reason to plead qualified immunity if the plaintiff

has not specifically set forth in his Complaint capacity. This Court has repeatedly held that the doctrine of qualified immunity entitles government employees to have the litigation filed against them disposed of at the absolute earliest possible stage of litigation. However, the adoption by the Sixth Circuit of the course of proceedings test, as well as the use of that test by other circuits, cannot be harmonized with the decisions of this court mandating an early determination regarding qualified immunity, as the employees can be effectively barred from raising qualified immunity until the district court makes a determination, through the course of proceedings, whether the plaintiff intended to sue the employee in an individual capacity. By that time, the employee would have either been subjected to the burdens of litigation qualified immunity is designed to avoid, or have been forced to respond as an individual defendant even though he was not so named.

The facts of this case clearly show such a conflict. As found by the district court below, and acknowledged by the majority opinion, the Complaint in this case does not specify that the officers were sued in their individual capacity. As a result, the officers did not file individual answers, did not hire independent counsel, did not participate in settlement negotiations, and, most importantly, did not raise the defense of qualified immunity, since the Complaint did not set forth a reason for them to do so. Thirteen months after the Complaint was filed, after discovery had been completed, and on the eve of trial, as recognized by the dissent below, Plaintiff, for the first time, indicated in his pleadings that he sought to hold these officers individually liable for civil rights violations. The Sixth Circuit has now found that to be sufficient. Thus, these officers' entitlement, as set out by this Court, not to "stand trial or face the other burdens of litigation" was eviscerated by the course of proceedings test.

The "threshold question" of immunity cannot possibly be resolved at an early stage of litigation if defendants are prohibited from raising that defense because a plaintiff did not properly allege capacity in the complaint. Requiring the district courts to sift through the "course of proceedings" to determine what capacity the plaintiff intended is in direct conflict with the protections afforded by qualified immunity, and the directions from this court to resolve that issue at the earliest possible stage of the litigation.

II. The Decision Below Allows A Federal Court To Exercise Jurisdiction That It May Not Have Under The Eleventh Amendment During The Protracted Course Of Proceedings.

The course of proceedings test completely undermines the jurisdictional concerns of the Eleventh Amendment.

A federal court must determine at the outset of litigation whether it has jurisdiction to decide a case. See, e.g., United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677 (1947). Federal courts are courts of limited jurisdiction, and may only exercise that authority conferred on them by Article III and congressional enactments. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 106 S.Ct. 1326 (1986).

An official capacity lawsuit is a suit only against the governmental entity. Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105 (1985); Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989). It is not an individual capacity suit against a named governmental employee. Graham, 473 U.S. at 166, 105 S.Ct. at 3105. Consequently, an official capacity judgment against a government employee does not impose liability on the

employee, but only on the governmental entity. Brandon v. Holt, 469 U.S. 464, 471, 105 S.Ct. 873, 877-878 (1985); Graham, 473 U.S. at 165-66, 105 S.Ct. at 3105. It is for this reason that the Sixth Circuit, as well as other circuits, has interpreted Will to require that a civil rights plaintiff plead with specificity the capacity in which he is suing state actors. See Wells v. Brown, 891 F.2d 591 (6th Cir. 1989); Nix v. Norman, 879 F.2d 429 (8th Cir. 1989).

Rule 9(a) of the Federal Rules of Civil Procedure requires a plaintiff to allege capacity in the Complaint when jurisdictional issues are present. The rule provides, in pertinent part:

> (a) Capacity. It is not necessary to aver the capacity of the party to sue or to be sued ... *except to the extent required to show the jurisdiction of the court.*

(emphasis added). Since the Eleventh Amendment places a jurisdictional limit on federal courts in some civil rights cases, Rule 9(a) must be read to require plaintiffs to properly allege capacity in their complaint. See Nix, 879 F.2d at 431 (citing Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir. 1984), *cert. denied* 474 U.S. 1014 (1985)).

This crucial jurisdictional issue, as set forth in this Court's prior holdings, and by the Rules of Civil Procedure, cannot be harmonized with the "course of proceedings test" as adopted by the Sixth Circuit below. Under the test, a complaint that does not state capacity could be interpreted as so stating, even though the federal court lacked jurisdiction the entire time. More importantly, the "course of proceedings test" undermines the district court's role to determine jurisdiction "at the outset." United Mine Workers,

330 U.S. 258, 67 S.Ct. 677 (1947). If a complaint fails to specify capacity, the court could ignore that defect. As recognized by the dissent below, the test adopted by the Sixth Circuit could allow a federal court to exercise jurisdiction that it does not have: "In short, the 'course of proceedings' test advanced by the majority is in tension with the concept of limited federal jurisdiction." 272 F.3d at 791.

III. The Course Of Proceedings Test Is Patently Unfair In That It Places The Burden On Defendants To Ascertain The Subjective Intent Of The Plaintiff, Rather Than Requiring The Plaintiff To Plead With Specificity.

The "course of proceedings" test adopted by the Sixth Circuit is patently unfair since it requires the defendants to determine whether they have been sued in their individual capacity rather than requiring the plaintiff to properly plead capacity in the first instance.

This case illustrates both the unfairness and burden placed on defendants. The complaint did not specify in what capacity these officers were being sued. Consequently, the officers did not hire their own attorneys, filed no answer, did not raise the defense of qualified immunity, and did not engage in any meaningful participation in the case other than as employees of the City. When the City filed a Motion to Dismiss the officers since they were not necessary parties, a few months before the scheduled trial date, the plaintiff chose not to amend his complaint to allege individual capacity until *after* the District Court had dismissed the officers, and on the eve of trial, as noted by the dissent below. Because the Plaintiff had failed to properly allege capacity, these officers were deprived of any meaningful participation throughout the

discovery process, in any role other than that of an official capacity defendant. As noted by the dissent,

> [T]he notice rationale serves to alert defendants at the lawsuit's inception whether they will be personally liable for damages. Without such timely notice defendants might rely on their governmental employer, fail to answer, and be subject to default judgment in their personal capacities. Further, without early notice government defendants cannot properly decide whether to retain independent counsel or to participate in collective defense strategies or settlement negotiations. Nor would the individual defendants be able to assess how best to engage in discovery. Under the course of proceedings analysis, individual capacity defendants are deprived of the ability to make a multitude of decisions regarding their own defense.

272 F.3d at 791. It is for precisely these reasons that the Sixth Circuit had long held that the burden for establishing capacity lies with the Plaintiff:

> Although modern pleading is less rigid than in an earlier day, *see Conley v Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957), we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential for payment of damages individually. *Brandon v. Holt*, 469 U.S. 474, 474, 105 S.Ct. 873, 879, 83

L.Ed.2d 878 (1985) (Burger, C.J., concurring in the judgment).

Wells v. Brown, 891 F.2d 591, 593 (6th Cir. 1989).

The "course of proceedings" test removes the burden of the Plaintiff to set forth a short and plain statement of the grounds for jurisdiction and relief, as required by Rule 8(a) of the Federal Rules of Civil Procedure, to specify capacity to the extent required to show the court's jurisdiction, as required by Rule 9(a) of the Rules, and to notify the defendants that they are being subjected to a claim for individual monetary damages, as previously required by the Sixth Circuit. See Wells v. Brown, 891 F.2d at 593. It is now incumbent on the public servant and the district court to inquire of the Plaintiff as to what capacity in which he is being sued.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to resolve existing circuit conflicts on what constitutes an individual capacity lawsuit, to harmonize the various circuit's use of the "course of proceedings" test with the doctrine of qualified immunity, and to reestablish that the burden is on the Plaintiff to properly allege capacity, rather than on the government employee to ascertain the Plaintiff's intent.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5258

[Filed November 8, 2001]

RALPH MOORE, JR.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CITY OF HARRIMAN;	)
HARRIMAN POLICE DEPARTMENT;	)
ROY JENKINS, Chief of Police,	)
Harriman Police Department;	)
DARREN MCBROOM; TERRY FINK;	)
RANDY HEIDLE;	)
VIRGIL MCCART;	)
JERRY SINGLETON,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville
No. 97-00243
James H. Jarvis, District Judge

JUDGES:

Before: MARTIN, Chief Judge; MERRITT, NELSON, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

COUNSEL:

ARGUED: Donald K. Vowell, VOWELL & ASSOCIATES, Knoxville, Tennessee, for Appellant.

Nathan D. Rowell, WATSON, HOLLOW & REEVES, Knoxville, Tennessee, for Appellees.

ON BRIEF: Donald K. Vowell, VOWELL & ASSOCIATES, Knoxville, Tennessee, for Appellant.

Nathan D. Rowell, Robert H. Watson, Jr., WATSON, HOLLOW & REEVES, Knoxville, Tennessee, for Appellees.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

Ralph Moore appeals the district court's order dismissing his 42 U.S.C. §1983 claims against five police officers for failure to clearly notify the officers that they were being sued in their individual capacities, under this Court's rule in *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989). A panel of this Court originally reversed the district court's decision, finding that although the complaint contained ambiguous language, taken as a whole it provided sufficient notice to the individual officers. *See Moore v. City of Harriman*, 218 F.3d 551 (6th Cir. 2000). The full Court

vacated that decision and granted a rehearing en banc to clarify the pleading requirements for a §1983 complainant seeking recovery from state officials in their individual capacities. *See Moore v. City of Harriman*, 218 F.3d 555 (6th Cir. 2000). For the following reasons, we reverse the district court's dismissal of Moore's claim.

I.

In April 1997, Moore sued the City of Harriman; the Harriman Police Department; Roy Jenkins, Chief of Police; and Officers Darren McBroom, Terry Fink, Randy Heidle, Virgil McCarter, and Jerry Singleton for using excessive force during Moore's arrest one year before. Moore alleged violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution and Article 1, §§7 and 8 of the Tennessee Constitution, as well as the state torts of malicious prosecution and abuse of process. Moore's complaint caption did not specify whether the officers were named in their official or individual capacities.

In January 1998, the officers moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim against them in their individual capacities. Moore responded that his complaint showed that he had sued each officer in his individual capacity, but on February 27, the district court granted the officers' motion without prejudice as to all such claims. On March 6, Moore moved for leave to amend the complaint to add the word "individually" after each officer's name in the complaint caption. Additionally, Moore filed a Rule 59 motion to alter or amend the judgment insofar as it dismissed "any claims against [the officers] in their individual capacities," because

it thus purported to dismiss the state law claims against the officers along with the §1983 claims. On April 15, the district court reinstated Moore's state law claims against the officers, but denied Moore the opportunity to amend his complaint, stating that such an amendment would be futile as the one-year statute of limitations underlying the §1983 claims had run. Moore timely appealed.

II.

We review the district court's dismissal of Moore's §1983 claims de novo. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). We review with care all dismissals on the pleadings, and "dismissals of complaints under the civil rights statutes are scrutinized with special care." *Jones v. Duncan*, 840 F.2d 359, 361 (6th Cir. 1988) (quoting *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982)).

In 1989, the Supreme Court ruled that states and state employees sued in their official capacities were not "persons" under §1983, and therefore could not be held liable for money damages. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). That same year, we held that *Will* required plaintiffs seeking damages under §1983 to set forth clearly in their pleading that they were suing state officials as individuals, rather than as officials. *See Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989).

Wells's pleading requirements for §1983 claimants rest on two rationales. First, *Wells* was concerned that defendants receive notice of the possibility of individual liability. *See*

Pelfrey v. Chambers, 43 F.3d 1034, 1038 (6th Cir. 1995). "It is certainly reasonable to ask that all plaintiffs . . . alert party defendants that they may be individually responsible in damages." *Wells, 891 F.2d at 594.* Second, *Wells* found that §1983 claimants must plead capacity for jurisdictional reasons. *Will* determined that the Eleventh Amendment creates a jurisdictional bar to suits against states and state employees sued in their official capacities for money damages; Rule 9(a) states in relevant part that "it is not necessary to aver the capacity of a party . . . except to the extent required to show the jurisdiction of the court." Fed.R.Civ.Pro. 9(a). Accordingly, *Wells* reasoned, "because the Eleventh Amendment places a jurisdictional limit on federal courts in civil rights cases against states and state employees, we understand Rule 9(a) to require plaintiffs to properly allege capacity in their complaint." *Wells*, 891 F.2d at 593.

Although other courts have read *Wells* to establish a per se rule requiring §1983 plaintiffs to affirmatively plead "individual capacity" in the complaint, *see*, *e.g.*, *Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995), we have never applied such a strict interpretation. In *Whittington v. Milby,* 928 F.2d 188 (6th Cir. 1991), decided just two years after *Wells*, we stated that "under *Wells v. Brown*, absent **any** indication that these defendants are being sued individually, we must assume that they are being sued in their official capacities . . . ." *Id.* at 193 (citation omitted) (emphasis added). In *Brooks v. American Broadcasting Companies, Inc.,* 932 F.2d 495 (6th Cir. 1991), we reaffirmed that "all a [§1983] complaint need do is afford the defendant 'fair notice of what the claim is and the grounds upon which it rests.'" *Id.* at 497 (quoting *Jones,* 840 F.2d at 361*)* (internal quotes and

citations omitted).

In fact, our post-*Wells* jurisprudence shows that we have applied a "course of proceedings" test to determine whether §1983 defendants have received notice of the plaintiff's intent to hold them personally liable, albeit without clearly labeling the test as such. For instance, we have refused to dismiss a §1983 complaint which failed to state "individual capacity," where one month after the complaint was filed, the plaintiff filed a motion stating that the defendants acted outside the scope of their employment and in bad faith. *See Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir. 1995). We have also looked to later pleadings, such as a response to a motion for summary judgment, to determine whether proper notice had been given. *See Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995). Therefore, while it is clearly preferable that plaintiffs explicitly state whether a defendant is sued in his or her "individual capacity," *see, e.g.*, *Hardin v. Straub*, 954 F.2d 1193, 2000 (6th Cir. 1992), failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice.[1]

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[1] The "course of proceedings" test considers such factors as the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. *See Biggs*, 66 F.3d at 61. The test also considers whether subsequent pleadings put the defendant on notice of the capacity in which he or she is sued. We are mindful of the timing of subsequent filings not, as the officers suggest, because they must be filed practically contemporaneous to the

The Supreme Court has noted that "the 'course of proceedings' in such [unspecified capacity] cases typically will indicate the nature of the liability sought to be imposed." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). Indeed, the vast majority of our sister circuits apply the "course of proceedings" test to determine whether suit has been brought against a state official as an official or as an individual. *See Atchinson v. District of Columbia,* 315 U.S. App. D.C. 318, 73 F.3d 418, 425 (D.C. Cir. 1996); *Biggs*, 66 F.3d at 61; *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529-30 (2d Cir. 1993); *Hill v. Shelander*, 924 F.2d 1370, 1373-74 (7th Cir. 1991); *Houston v. Reich*, 932 F.2d 883, 885 (10th Cir. 1991); *Melo v. Hafer*, 912 F.2d 628, 635 (3d Cir. 1990); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987); *Parker v. Graves*, 479 F.2d 335, 336 (5th Cir. 1973). Only two circuits expressly deviate from this test. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) (presuming official liability absent express statement that suit is brought against defendant in individual capacity); *Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho*, 42 F.3d 1278, 1284 (9th Cir. 1994) (presuming individual liability when complaint seeks money damages from state officials).

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opinion, but rather to determine whether the parties are still in the early stages of litigation. This ensures both fairness to defendants, *Wells's* first concern, and the resolution of any jurisdictional problems at an early stage, *Wells's* second concern. As this case appears before us on appeal from a Rule 12(b)(6) dismissal, we assume it is still in a relatively early stage of litigation.

The officers in this case urge us to read *Wells* as adopting the Eighth Circuit's rule presuming an official capacity suit absent an express statement to the contrary. They argue that to withstand a motion to dismiss, *Wells* requires complaints seeking damages for alleged violations of §1983 to contain the words "individual capacity," regardless of whether the defendants actually receive notice that they are being sued individually. Although we acknowledge that *Wells* contains language supporting this reading, we find the more reasonable interpretation to be that §1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction. When a §1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether *Wells's* first concern about notice has been satisfied.[2]

Here the district court erred in dismissing Moore's §1983 claims against the individual officers. The caption on Moore's complaint lists only the officers' names, not their official titles. The complaint refers to the officers throughout as the "individual defendants." Paragraph Eleven of the complaint states, "The said officers, acting *for themselves and* for the City," behaved "with malice . . . and violated the plaintiff's civil rights." (emphasis added). Finally, Moore sought compensatory and punitive damages against "each of

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[2] We are not concerned today with *Wells's* jurisdictional rationale. The officers are employees of a municipality, and the Eleventh Amendment does not apply to municipalities. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Therefore, we address only *Wells's* concern that defendants receive proper notice.

the defendants." Taken as a whole, the complaint likely provided sufficient notice to the officers that they were being sued as individuals.

Even assuming the complaint itself failed to provide sufficient notice, Moore's response to the officers' motion to dismiss clarified any remaining ambiguity: "The individuals named are police officers who are being sued in their individual capacities for using excessive and unreasonable force while making an arrest of the Plaintiff on April 7, 1996." Subsequent filings in a case may rectify deficiencies in the initial pleadings. *See Abdur-Rahman*, 65 F.3d at 491; *Pelfrey*, 43 F.3d at 1038. *Abdur-Rahman* reversed the dismissal of a plaintiff's §1983 claims, because the plaintiff's response to the defendants' motion for summary judgment provided sufficient notice that suit had been brought against them in their individual capacities. *See Abdur-Rahman*, 65 F.3d at 491. Although the officers cite several unpublished cases in support of their argument that Moore did not provide them with proper notice, they fail to mention, let alone distinguish, *Abdur-Rahman* from the case at bar. We find the two sets of facts functionally equivalent and therefore reverse the district court's order dismissing Moore's §1983 claims.

III.

Additionally, we find that the district court erred in refusing to allow Moore to amend his complaint. The district court correctly noted that the appropriate statute of limitations for Moore's §1983 claims was one year, and that by the time he sought to amend his complaint, almost two years had passed. It failed, however, to properly apply Federal Rule of Civil Procedure 15(c), which would have allowed the

amended complaint to relate back to the original filing date, such that it would not be barred by the one-year statute of limitations.

Rule 15(c)(2) allows amendments to relate back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15(c)(3), addressing changes to a party or "the naming of a party," states that an amendment relates back if the provisions of 15(c)(2) are satisfied, the defendant received notice of the suit within 120 days following the filing of the original complaint, the notice was such that the defendant "will not be prejudiced in maintaining a defense on the merits," and the defendant "knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Although we have not answered whether Rule 15(c)(2) applies when a §1983 plaintiff seeks to alter the capacity in which a defendant has been sued, we have held this type of alteration acceptable under Rule 15(c)(3). *See Brown v. Shaner*, 172 F.3d 927, 934 (6th Cir. 1999).

We are satisfied that the requirements of Rule 15(c)(3) have been met here. There is no question that the original and amended complaints involve the same conduct, and thereby satisfy the requirements of Rule 15(c)(2). The officers each received proper service of process within 120 days of the filing of the complaint. Moreover, the officers will not be prejudiced in any way by allowing Moore to clarify that he seeks individual liability on the §1983 claims. Moore sued the officers not only for violations of §1983, but also for the state torts of malicious prosecution and abuse of process, as well

as for state constitutional violations. Therefore, the officers received clear notice from the beginning that they faced individual liability of some sort for the conduct of which Moore complains, and have thus not been denied an opportunity to retain individual counsel or prepare a defense. Finally, the officers knew or should have known that Moore's §1983 theory claimed they were individually liable for the alleged violations. Moore's complaint alleged conduct committed by the officers "for themselves and for the City," and that they acted "with malice . . . in violation of plaintiff's civil rights." Accordingly, we find that the district court erred in denying Moore leave to amend his complaint pursuant to Rule 15(c)(3).

IV.

In conclusion, we reaffirm *Wells's* requirement that §1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and we clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received, as demonstrated by our decisions in *Pelfrey* and *Abdur-Rahman*. Because we find this case governed by *Abdur-Rahman*, we reverse the district court's dismissal of Moore's complaint. Additionally, we find that the district court should have allowed Moore to amend his complaint pursuant to Rule 15(c)(3). We thus remand for further proceedings.

CONCURRENCE

MERRITT, Circuit Judge, concurring. I concur in Sections I and II of the Court's opinion but I find Section III

unnecessary and, therefore, do not concur in that section. I do not think we should decide the amendment issue when we have just decided in this case that the plaintiff has stated a claim of individual capacity. It is not only unnecessary to go further, but it may be harmful to do so because the opinion will be read as applying to state officials for whom a clear statement of capacity is jurisdictional and probably should not relate back. I do think, however, that we should follow the majority of Circuits on the major question of the meaning of our opinion in *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989).

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I concur in the result reached by the majority opinion, and I agree with much of its reasoning. In particular, the adoption of the "course of proceedings" test to determine the capacity in which a public official is sued, and the holding that the district court erred in refusing to allow Moore to amend his complaint, strike me as the proper rulings in this case.

I write separately, however, to express my agreement with the following point made by the dissent: "Although the majority pays lip-service to the *Wells* rule, what it is really doing is adopting a course of proceedings test. It is disingenuous to do so without explicitly overruling *Wells*." Dissenting Op. at 39. The majority sitting en banc, of course, is perfectly free to abandon the rule in *Wells* (and the dissent does not claim otherwise), but it would be preferable to do so forthrightly. To do otherwise leaves the court open to the criticism that it is denying the obvious until an objective observer cries out that "the emperor has no clothes." Hans Christian Andersen, The Emperor's New Clothes, in The

Little Mermaid and Other Fairy Tales (1963).

DISSENT

SUHRHEINRICH, Circuit Judge, dissenting. The majority opinion purports to "reaffirm *Wells's* requirement that §1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and [to] clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received, as demonstrated by our decisions in *Pelfrey* and *Abdur-Rahman*." *Ante* at 9. In actuality, however, the majority eviscerates the *Wells* standard, expands the narrow exception created in *Pelfrey* beyond all reasonable bounds, transfers the pleading burden from plaintiffs to clearly plead individual capacity to government defendants to clarify the capacity in which they are sued, and adopts a standard-less "course of proceedings" test that ignores the certainty the Rules of Civil Procedure are intended to secure. Thus, I dissent.

I.

Setting aside for the moment the basic illogic of the majority's position - namely that compliance with a pleading[1]

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[1] Rule 7 of the Federal Rules of Civil Procedure defines what constitutes a "pleading":

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the

rule requiring clear notice of capacity can somehow be verified through subsequent proceedings - the majority's decision cannot be reconciled with *Wells* and its progeny. Because the majority largely ignores it, explication of our precedent is in order.

As the majority notes, the Supreme Court's decision in *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989), prompted our ruling in *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1990). *Will* held that a State is not a "person" within the meaning of §1983. *Will*, 491 U.S. at 64. The *Will* court further held that although "state officials literally are persons," *id.* at 71, "a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office." *Id.* And, "[a]s such, it is no different from a suit against the State itself." *Id.*[2] An important consideration in

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provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Fed. R. Civ. P. 7(a).

[2] By contrast, "state officials, sued in their individual capacities, are 'persons' within the meaning of §1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under §1983 solely by virtue of the 'official' nature of their acts." *Hafer v. Melo*, 502 U.S. 21, 31, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991).

For a discussion of the distinction between personal- and official-capacity actions, *see Kentucky v. Graham*, 473 U.S. 159, 166-67, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985).

the *Will* court's analysis was the Eleventh Amendment, which bars suits against a State in federal court absent a waiver of sovereign immunity. *Id.* 491 U.S. 58 at 66-67.[3]

In *Wells*, pro se prisoners sued nine state corrections officials under §1983 for money damages. The complaint characterized each defendant official's conduct in terms of their official capacity only. *Wells*, 891 F.2d at 593. We held that *Will* made it unnecessary to reach the merits of the plaintiffs' claims, because the Wells complaint did not clearly set forth that they were suing the state defendants in their individual capacity for damages, not merely in their capacity as state officials. *Id.* at 592.[4] In so ruling, we adopted the Eighth Circuit's standard for §1983 pleadings that requires plaintiffs to "clearly set forth in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials." *Id.* at

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[3] The petitioner in *Will* filed the §1983 action in state court. In dicta, the *Will* court also suggested that the Eleventh Amendment does not apply in state court. *See Will*, 491 U.S. at 63-64. *Cf. Alden v. Maine*, 527 U.S. 706, 735, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (noting that statement in *Will* is dicta).

[4] The Supreme Court, although it has noted the split of authority in the Circuits regarding pleading requirements for § 1983 claims, has not addressed the issue before us. *Hafer v. Melo*, 502 U.S. 21, 24, 116 L. Ed. 2d 301, 112 S. Ct. 358 n.* (1991) (collecting cases and expressly declining to decide an issue not properly before the Court). The *Hafer* Court indicated, however, "that '[i]t is obviously preferable for the plaintiff to be specific *in the first instance* to avoid any ambiguity.'" *Id.* (quoting *Hafer v. Melo*, 912 F.2d 628, 636 n.7 (3d Cir. 1990)) (emphasis added).

592 (citing *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)).[5]

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[5] The majority "acknowledges" the officers' reading of *Wells* as adopting the Eighth Circuit's rule presuming an official capacity suit absent an express statement to the contrary, but "find[s] the more reasonable interpretation to be that §1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction." *Ante*, at 6-7. I have a hard time understanding this gloss on the plain language of *Wells*:

> We *adopt* the Eighth Circuit's interpretation of *Will, which requires that plaintiffs seeking damages under §1983 set forth clearly in their pleading* that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials. *See Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989).

Wells, 891 F.2d at 592 (emphases added).

Notably, in *Wells*, although we adopted the Eighth Circuit's rule, unlike that court, we did not require or suggest any "magic words" to be used in a complaint. *Compare Wells*, 891 F.2d at 593 (stating simply that "the face of a complaint must indicate whether a plaintiff seeks to recover damages from defendants directly, or to hold the state responsible for the conduct of its employees") *with Nix*, 879 F.2d at 431 ("[W]e have repeatedly stated that section 1983 litigants wishing to sue government agents in both capacities should simply use the following language: 'Plaintiff sues each and all defendants in both their individual and official capacities.'" (quoting *Rollins by Agosta v. Farmer*, 731 F.2d 533, 536 n.3 (8th Cir. 1984))).

As the majority observes, *Wells* based its holding on two fundamental concerns: the Eleventh Amendment bar to suits against a state in federal court, and notice to defendants that personal assets may be at risk in a cause of action. Regarding the threshold issue of jurisdiction, we stated:

> Rule 8(a) of the Federal Rules of Civil Procedure requires a short and plain statement of the grounds for jurisdiction and relief. Although Rule 8 has liberalized pleading, it should not be read to alter the *jurisdiction* of federal courts. Read together with the jurisdictional limits of Rule 9(a), even liberalized pleading under Rule 8(a) cannot confer jurisdiction on this Court to entertain suits against states and state officials when the Eleventh Amendment bars us from doing so. Rule 9(a) provides in pertinent part:
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> (a) Capacity. It is not necessary to aver the capacity of the party to sue or be sued . . . *except to the extent required to show the jurisdiction of the court*. (emphasis added).
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> Accordingly, because the Eleventh Amendment places a jurisdictional limit on federal courts in civil rights cases against states and state employees, we understand Rule 9(a) to *require* plaintiffs to properly allege capacity in their complaint.

Id. at 593 (citations omitted).[6]

> As for notice to the defendants, we stated that
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> [A]lthough modern pleading is less rigid than in an earlier day, *see Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99. . . (1957) , we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential for payment of damages individually.

Id. Notice of personal capacity in turn allows government defendants to avail themselves of the qualified immunity defense. We explained the policy rationale of the qualified immunity doctrine, i.e., the "desire to shield public officials from diverting their energies through the forced defense of challenges to their actions taken in their governmental capacities," and the related requirement that those who are entitled to such immunity "should be granted that immunity at the earliest possible stage of the case." *Id.* at 593-594 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). This means resolving the immunity question prior to discovery. *Id.* at 593 (citing *Harlow*, 457

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[6] This case does not implicate the Eleventh Amendment because only municipal defendants were sued. However, the second *Wells* rationale applies, regardless of the state or local status of the defendants, and the case law has applied it as such.

U.S. at 818).[7]

Thus, in *Wells*, we concluded that "[t]he passing reference to these corrections officials' 'personal involvement in this complaint' assert[ing] that they knew of and participated in certain events . . . [did] not convert th[e] lawsuit against the defendants' offices to one that sufficiently alerts these officials that they may be personally accountable for any damages liability that may flow from plaintiffs' due process claim." *Id.* at 593. Because the plaintiffs' complaint did not meet the *Nix* test of clearly pleading that defendants were being sued in their individual capacity for damages, we

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[7] We added that:

> This principle is reinforced by the fact that in recent years an increasingly large number of frivolous cases have been filed in federal court-both by lawyers and *pro se*. Many of these suits waste the time of public officials, lawyers and the courts. Minimum pleading requirements are needed, even for *pro se* plaintiffs, whose lawsuits now comprise more than 1000 or almost 25 of the appeals filed in this Court. It is certainly reasonable to ask that all plaintiffs, even *pro se* plaintiffs, some of whom file several appeals each year with us, alert party defendants that they may be individually responsible in damages. The trial and appellate courts should not have to guess at the nature of the claim asserted. *See Clark v. National Travelers Life Ins. Co.*, 518 F.2d 1167 (6th Cir. 1975).

Wells, 891 F.2d at 594.

affirmed the district court's grant of summary judgment and dismissed the appeal for lack of subject matter jurisdiction. *Id.* at 592.

Contrary to the majority's characterization of our case law, we have *not* applied a "course of proceedings" test but instead have strictly followed *Wells's* requirement that §1983 plaintiffs clearly plead "individual capacity" in the complaint.[8] In the first published case to apply *Wells*, *Whittington v. Milby*, 928 F.2d 188 (6th Cir. 1991) (per curiam), we

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[8] In support of its assertion that we have never read *Wells* to establish a per se rule requiring §1983 plaintiff to affirmative plead "individual capacity" in the complaint, the majority cites *Brooks v. American Broadcasting Cos.*, 932 F.2d 495 (6th Cir. 1991), as reaffirming that "[a]ll a [§1983] complaint need do is afford the defendant 'fair notice of what the *claim* is and the grounds upon which it rests.'" *Id.* at 497 (quoting *Jones v. Duncan*, 840 F.2d 359, 361 (6th Cir. 1988) (emphasis added)). *Brooks* does not cite either *Wells* or *Whittington*. Perhaps that is because capacity was not at issue in *Brooks*. Rather, the issue in *Brooks* was the legal basis for his §1981 and §1985 claims. We concluded on both counts that the plaintiff's allegations were too vague and conclusory to withstand a motion to dismiss. *Id.* at 497-99. Similarly, in *Duncan*, at issue was "the sufficiency of the allegations in a complaint for an action under section 1983." *Duncan*, 840 F.2d at 361. More specifically, the issue was whether the plaintiff adequately alleged that the defendants' actions were taken "under color of law" as required *to state a claim* under §1983. Again, capacity was not an issue. Thus, the majority's reliance on these two cases is not only inappropriate, it is disingenuous, given that there is ample Sixth Circuit authority on the issue of pleading capacity.

affirmed the district court's dismissal of the §1983 claim against a county attorney, a warning officer attorney, and judge, stating that, "[u]nder *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989), absent any indication that these defendants are being sued individually, we must assume that they are being sued in their official capacities - county attorney, warning officer attorney, and judge, respectively. Because Mr. Whittington is seeking monetary relief only, his §1983 claim against these officials cannot be sustained." *Whittington,* 928 F.2d at 193. In *Whittington*, only the notice rationale of *Wells* was implicated, because the suit was against local officials. Thus, in *Whittington*, we implicitly recognized the notice rationale as an independent basis for requiring that individual capacity be pleaded in the complaint.

Next[9], in *Hardin v. Straub*, 954 F.2d 1193 (6th Cir.

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[9] *Ritchie v. Wickstrom*, 938 F.2d 689 (6th Cir. 1991), was actually the next published decision applying *Wells*. However, the opinion does not shed much light on *Wells*. Without discussing the specific language of the complaint, we held that:

> When the foregoing is used as the analytical tool to evaluate plaintiff's claim in the case at bar, it becomes instantly clear that the suit against corrections officer Wickstrom is an "individual capacity" suit not subject to eleventh amendment protections.[5] Similarly, we believe the suit against Koehler is an "individual capacity" suit, notwithstanding that no "hands on" misconduct is claimed.
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> 5. We do not find this holding to be inconsistent with *Wells v. Brown*, 891 F.2d 591 (6th Cir.

> 1989), when *Wells* is read against the clear mandate of the relevant Supreme Court decisions.

Id. at 692.

A full reading of *Ritchie* reveals that the focus of that opinion was to clarify the Sixth Circuit's interpretation of Eleventh Amendment immunity. Prior to *Hafer*, this Court had issued an opinion, *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936 (6th Cir. 1990), in which we dismissed claims against individual defendants, holding that the claim was an "official capacity" claim and, thus, was really an attempt to collect money damages against the university, a state agency with Eleventh Amendment immunity. In *Hafer*, the Supreme Court characterized *Cowan* as endorsing the view that state officials may not be held liable in their personal capacity for actions they take in their official capacity. *See Hafer*, 502 U.S. at 27.

In *Ritchie*, Judge Guy, who was also the author of *Cowan*, clarified that this was not what *Cowan* held.

> The decision in *Cowan*, of which I was the author, is being misinterpreted by the defendants. . . . *Cowan* does not stand for the proposition that every time a state official is charged with misconduct while acting within the general ambit of his job title eleventh amendment immunity comes into play. All that was intended in *Cowan* was to indicate that in that case the two individual defendants were merely carrying out state policy and, as such, the suit was no different than if it was brought solely against the state.

Ritchie v. Wickstrom , 938 F.2d at 692. As we observed in *Hardin*:

1992), which involved a state prison official as defendant, we noted that *Wells* requires plaintiffs to "set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials." *Id.* at 1199 (quoting *Wells*, 891 F.2d at 592). The *Hardin* court found that the plaintiff in that case had satisfied the *Wells* requirement, since the complaint stated that "'Defendant Straub is being sued in his individual capacity on the plaintiff's claim for damages and both in his individual and official capacity on the plaintiff's claim for injunctive relief.'" *Id.* 954 F.2d 1193 at 1200 (quoting complaint).

In *Lovelace v. O'Hara*, 985 F.2d 847 (6th Cir. 1993), the plaintiff sued a county police officer under §1983 for damages, but clearly set forth in her complaint that he was being sued "*not as an individual*, but rather under the color and pretense of the title of his office; under the authority of his office as a police officer; *clearly within the expressed and implied powers of his official capacity*." *Id.* at 849. The district court therefore treated the complaint as against O'Hara in his official capacity only, and granted summary judgment. The district court later allowed the plaintiff to amend the complaint to name the officer in his individual

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"*Ritchie* demonstrates that the law of this circuit was consistent with the interpretation of Eleventh Amendment immunity adopted by this Court in *Hafer*." *Hardin*, 954 F.2d at 1200 n.2.

In short, *Ritchie* is not particularly relevant in this case.

capacity, however, despite the fact that the one-year statute of limitations had run. *Id.* The court granted summary judgment to the police officer on qualified immunity grounds. *Id.* On appeal, this Court found that the district court erred in allowing the amendment. *Id.* at 850.

> Invoking *Wells*, we remarked:
>
> > This court has recognized the importance of giving defendants notice of the capacity in which they are being sued. In *Wells v. Brown,* 891 F.2d 591 (6th Cir. 1989), this court stated:
> >
> > [T]he face of a complaint must indicate whether a plaintiff seeks to recover damages from defendants directly, or to hold the state responsible for the conduct of its employees. Although modern pleading is less rigid than in an earlier day, we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential for payment of damages individually.
> >
> > *Id.* at 593 (citations omitted).

Id. at 850. We found that the original complaint "clearly fail[ed] to comport with the requirement of *Wells* that a defendant be 'clearly notified of the potential for payment of damages individually.'" *Id.* (quoting *Wells,* 891 F.2d at 593). We also cited the policy considerations we had previously

discussed in *Wells*.

> Furthermore, the distinction between an official capacity and an individual capacity suit is significant. As the dissent in *Hill v. Shelander* noted, "an amendment in a defendant's capacity in a lawsuit under 42 U.S.C. §1983 alters the elements of recovery and defense . . . [and] require[s] major changes in pleading, discovery, trial preparation and selection and location of witnesses to testify at trial." *Hill v. Shelander*, 924 F.2d 1370, 1384 (7th Cir. 1991) (Coffey, J., dissenting). As O'Hara argues, knowledge that he was being sued personally may have prompted him to develop a much different legal strategy. Thus, we must conclude that he did not have such notice within 120 days of the filing of the complaint as to preclude prejudice in the preparation of his defense.

Id.

In *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376 (6th Cir. 1993), several Michigan corporations sued the Revenue Division of the Michigan Department of the Treasury, the Treasurer of the State of Michigan in his official capacity, and the Commissioner of Revenue of the State of Michigan in his official capacity, seeking declaratory, injunctive, and monetary relief. This court affirmed the district court's dismissal of the plaintiff's motion to amend to add a §1983 claim against, *inter alia*, the named officials because an amendment would be futile:

> This Court has held that section 1983 plaintiffs must clearly set forth in their pleadings that they are suing the officials in their individual capacities for damages, not simply in their capacities as state officials. *Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1999); *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). Failure to clearly name the officials in their individual capacities mandates the conclusion that jurisdiction is lacking over any possible claims against the officials in their individual capacities. *Id.* at 593-94.

Id. at 383.

Similarly, in *Soper ex rel. Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999), *cert. denied*, 530 U.S. 1262, 147 L. Ed. 2d 984, 120 S. Ct. 2719 (2000), we observed:

> Generally, plaintiffs must designate in which capacity they are suing defendants; if not, by operation of law, defendants are deemed sued in their official capacities. *See Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1992); *Wells v. Brown*, 891 F.2d 591, 592-94 (6th Cir. 1989).

Id. at 853. There, we found that the plaintiffs had failed to designate in which capacity they sued the defendants. Notwithstanding, we affirmed the dismissal on other grounds because the pleading issue was not briefed by the parties. *Id.* *See also Matthews v. Jones*, 35 F.3d 1046, 1049 n.1 (6th Cir.

1994) (noting that despite claims which could be construed as against the officer in his individual capacity, the officer was joined only in his official capacity so that *Wells* was not met); *cf. Sanderfer v. Nichols*, 62 F.3d 151, 152 n.1 (6th Cir. 1995) (assuming court-ordered substitution of party in her individual capacity given *Wells* standard and in light of the court's simultaneous rulings; reversing denial of defendant's motion for summary judgment).

In short, our published decisions (with two exceptions which I will discuss momentarily) illustrate that the *Wells* rule requiring the plaintiff to clearly plead individual capacity in the pleadings has been strictly and consistently followed.

Our unpublished decisions likewise demonstrate that, for over a decade, we have strictly applied the *Wells* standard to require that the plaintiff affirmatively plead capacity in the complaint as a predicate to monetary relief. *See, e.g., Chenault v. Tenn. Dep't of Mental Health*, 2001 U.S. App. LEXIS 3932, at *3 (published in table format at 248 F.3d 1147 (6th Cir. 2001) (order) (because complaint did not indicate that the defendants were being sued personally, court assumed that they were sued in their official capacity as state employees; citing *Wells*), *petition for cert. filed*, 69 U.S.L.W. 3780 (June 5, 2001) (No. 00-1823) ; *Jasman v. Schmidt*, 248 F.3d 1149, 2001 U.S. App. LEXIS 12597, WL 128430, at *1 (6th Cir. 2001) (affirming district court's holding that defendants were immune from monetary damages because the plaintiff failed to allege capacity; citing *Wells*); *Lillie v. Egelhoff*, 238 F.3d 422, 2000 U.S. App. LEXIS 36150, 2000 WL 1829015, at *1 (6th Cir. 2000) (order) (same), *cert. denied*, 149 L. Ed. 2d 316, 121 S. Ct. 1393 (2001); *Miles v. Booth*, 238 F.3d 422, 2001 U.S. App. LEXIS 36154, 2000

WL 1800565, at *3 (6th Cir. 2000) (order) (same); *Turnboe v. Stegall*, 234 F.3d 1270, 2000 U.S. App. LEXIS 35137, 2000 WL 1679478, at *2 (6th Cir. 2000) (order) (same), *cert. denied*, 149 L. Ed. 2d 480, 121 S. Ct. 1616 (2001); *Ashiegbu v. Williams*, 2000 U.S. App. LEXIS 28274, 229 F.3d 1150, 2000 WL 1206563, at *1 (6th Cir. 2000) (order) (same), *cert. dismissed*, 121 S. Ct. 845 (2001); *Green v. Waldren*, 2000 U.S. App. LEXIS 24144, 221 F.3d 1334, 2000 WL 876765, at *2 (6th Cir. 2000) (order) (same); *Overholt v. Unibase Data Entry, Inc.*, 2000 U.S. App. LEXIS 24186, 221 F.3d 1335, 2000 WL 799760, at *2 (6th Cir. 2000) (order) (same); *Jones v. Porter*, 2000 U.S. App. LEXIS 14750, 211 F.3d 1269, 2000 WL 572059, at *1-2 (6th Cir. 2000) (order) (holding that district court did not err by failing to construe the complaint as alleging an abuse of process claim; citing *Wells*); *Marceaux v. Ramsey*, 2000 U.S. App. LEXIS 10546, 208 F.3d 214, 2000 WL 282881, at *1 (6th Cir. 2000) (holding that defendants were sued in their official capacities because complaint failed to specify capacity; citing *Wells*); *Avery v. Nicol*, 2000 U.S. App. LEXIS 10517, 208 F.3d 212, 2000 WL 282903, at *1 (6th Cir. 2000) (holding that suit seeking money damages could proceed against defendants because complaint alleged that defendants were sued in their individual capacity; citing *Wells*); *Van Martin v. Newkirk*, 2000 U.S. App. LEXIS 13142, 210 F.3d 373, 2000 WL 178399, at *2 (6th Cir. 2000) (holding that district court properly dismissed money damages suit because plaintiff failed to specify capacity in which he was suing defendants; citing *Wells*); *Siller v. Cruise*, 2000 U.S. App. LEXIS 37641, 202 F.3d 270, 1999 WL 1281774, at *1 (6th Cir. 1999) (affirming dismissal of damages action because defendants were sued only in their official capacity as state employees; citing *Wells*); *Shaw v. Michigan*, 202 F.3d 270, 1999 WL

1253082, at *1 (6th Cir. 1999) (same); *Abdur-Reheem-X v. McGinnis*, 1999 U.S. App. LEXIS 35445, 198 F.3d 244, 1999 WL 1045069, at *1 (6th Cir. 1999) (order) (holding that money damages claim could proceed as to some defendants who were sued in their individual capacities; citing *Wells*); *Noble v. Sapp*, 1999 U.S. App. LEXIS 35493, 198 F.3d 246, 1999 WL 1045090, at *1 (6th Cir. 1999) (order) (holding that district court properly dismissed suit to extent it demanded money damages against defendants in their official capacities, but suit for money damages could proceed against defendants to extent they were sued in their individual capacities; citing *Wells*); *Graham v. Mercer*, 1999 U.S. App. LEXIS 35418, 198 F.3d 245, 1999 WL 1045103, at *1 (6th Cir. 1999) (order) (holding state defendants were not subject to suit for monetary damages because the plaintiff failed to designate capacity; thus it was assumed that they were sued in their official capacity; citing *Wells*); *Napier v. Baron*, 198 F.3d 246, 1999 WL 1045169, at *1 (6th Cir. 1999) (order) (same), *cert. denied*, 531 U.S. 904, 148 L. Ed. 2d 177, 121 S. Ct. 246 (2000); *Still v. Wilkinson*, 194 F.3d 1314, 1999 WL 801577, at *1-2 (6th Cir. 1999) (order) (holding *Wells* met in the plaintiff's third claim because he specified in his pro se complaint that he was suing defendants in their individual capacities; noting also that the plaintiff again expressed his intent to sue the defendants in their individual capacities in his response to the defendants' motion for summary judgment; citing *Abdur-Rahman*); *Scott v. Kinkela*, 191 F.3d 453, 1999 WL 776313, at *2 (6th Cir. 1999) (*Wells* not met because plaintiff failed to plead capacity); *Cole v. Smith*, 188 F.3d 506, 1999 WL 685940, at *1 n.1 (6th Cir. 1999) (per curiam) (same; nevertheless addressing both capacities where neither parties nor court addressed *Wells* and upholding dismissal of the action); *Knecht v. Collins*, 187 F.3d 636, 1999 WL

427173, at *2 (6th Cir. 1999) (per curiam) (*Wells* not met because second amended complaint did not name defendant in his individual capacity); *Dixon v. Nusholtz*, 187 F.3d 635, 1999 WL 507031, at *1 (6th Cir. 1999) (because the plaintiff did not specify the capacity in which he sued the defendant, it was presumed under *Wells* that the defendant was sued in his official capacity); *Buckner v. Woods,* 187 F.3d 634, 1999 WL 506982, at *1 (6th Cir. 1999) (same); *Parks v. Conley,* 178 F.3d 1295, 1999 WL 195740, at *1 (6th Cir. 1999) (same); *Martin v. Million*, 178 F.3d 1295, 1999 WL 196520, at *1 (6th Cir. 1999) (complaint named the defendants in their official capacities; affirming the district court's sua sponte dismissal for failure to state a claim because defendant prison employees are not "persons" subject to suit in their official capacities; citing *Will* and *Wells*); *Rush v. Coyle*, 178 F.3d 1296, 1999 WL 220131, at *1 (6th Cir. 1999) (holding that district court dismissal of complaint was appropriate because the complaint did not indicate that the warden was sued personally, and under *Wells* it must be assumed that he was sued in his official capacity and therefore not subject to damages under 1983); *Lutchey v. Ohio*, 173 F.3d 429, 1999 WL 96741, at *2 (6th Cir. 1999) (same); *Boyd v. Myers*, 173 F.3d 428, 1999 WL 97000, at *1 (6th Cir. 1999) (same); *Blackshear v. Russell*, 173 F.3d 854, 1999 WL 98515, at *1 (6th Cir.) (same), *cert. denied*, 528 U.S. 848, 145 L. Ed. 2d 105, 120 S. Ct. 124 (1999); *Kellon v. Smith*, 172 F.3d 873, 1999 WL 68680, at *1 n.2 (6th Cir. 1999) (per curiam) (same); *McClennon v. Bell*, 168 F.3d 490, 1998 WL 792047, at *2 (6th Cir. 1998) (order) (same); *Burrell v. Sumner*, 166 F.3d 1213, 1998 WL 786979, at *1 (6th Cir. 1998) (same); *Fennell v. Simmons*, 162 F.3d 1161, 1998 WL 552830, at *2-3 (6th Cir. 1998) (Nelson, J.,) (dismissing appeal on jurisdictional grounds because the complaint failed to clearly

set forth that the plaintiff was suing the state defendants in their individual capacities; citing *Wells*); *Young v. Ward*, 149 F.3d 1185, 1998 WL 384564, at *1 (6th Cir. 1998) (order) (affirming grant of summary judgment, noting that the plaintiff did not specify the capacity that he was suing the defendants in their individual capacities, and under *Wells* defendants would be considered as sued in their official capacities); *Brown v. Glover*, 156 F.3d 1228, 1998 WL 415831, at *1 (6th Cir. 1998) (order) (same); *Walker v. Chattanooga Police Dep't*, 145 F.3d 1335, 1998 WL 246033, at *1 (6th Cir. 1998) (same) (affirming district court judgment dismissing suit seeking monetary relief, noting that the plaintiff failed to specify capacity, and absent such, a state official will be construed as sued in his official capacity; citing *Wells*); *Morris v. Metrish*, 145 F.3d 1332, 1998 WL 246454, at *2 (6th Cir. 1998) (affirming dismissal of complaint seeking solely monetary damages under §1983 because the plaintiff did not specify that he was suing the defendant in her individual capacity, and that under *Wells* it must be assumed that the defendant was sued in official capacity only); *Tweed v. Wilkinson*, 145 F.3d 1333, 1998 WL 228054, at *2 (6th Cir. 1998) (same); *Browner v. Maynard*, 145 F.3d 1330, 1998 WL 211797, at *1 (6th Cir. 1998) (same); *Browner v. Hill*, 142 F.3d 432, 1998 WL 124041, at *1 (6th Cir. 1998) (order) (same); *Cummings v. Wilkerson*, 134 F.3d 370, 1998 WL 30803, at *1-2 (6th Cir. 1998) (Ryan, J.) (holding that the plaintiff's suit for money damages was barred by the Eleventh Amendment because the complaint failed to clearly indicate that he was suing the state defendants in their individual capacities; distinguishing *Pelfrey* on grounds that in case *sub judice* the defendants moved for dismissal, not the plaintiff, and disallowing third amendment to complaint); *Strader v. Campbell*, 134 F.3d

372, 1997 WL 809939, at *1 (6th Cir. 1997) (order) (limiting suit to equitable portions of second and tenth claims because the plaintiff did not specify the capacity in which he sued defendant prison officials, invoking *Wells*); *Clemons v. Frassetto*, 132 F.3d 32, 1997 WL 778121, at *1 (6th Cir. 1997) (order) (upholding dismissal of complaint in part because state the plaintiff did not specify that he was suing the state defendants for monetary damages in their individual capacities, citing *Wells*); *Powers v. Zimmerman*, 129 F.3d 1265, 1997 WL 704944, at *1 (6th Cir. 1997) (same); *Wimberly v. Leavell*, 110 F.3d 66, 1997 WL 135578, at *1 (6th Cir. 1997) (order) (affirming grant of summary judgment in part because the plaintiff did not specify the capacity in which he sued the defendant, citing *Wells*); *Hughes v. Collins,* 107 F.3d 870, 1997 WL 76210, at *1 (6th Cir. 1997) (order) (affirming dismissal of complaint for money damages because the plaintiff did not specify capacity in which the defendants were being sued, and under *Wells* "we regard them as having been sued in their official capacities"); *Harvest v. Randolf,* 104 F.3d 361, 1996 WL 733130, at *2 (6th Cir. 1996) (per curiam) (holding that state defendant shared absolute Eleventh Amendment immunity with state department of transportation because the complaint did not specify capacity in which he was sued, stating that "[u]nder the settled law of this Circuit, where a complaint seeking monetary damages against a state official under 42 U.S.C. §1983 does not clearly state that the official is sued in his individual or personal capacity, the court must treat the lawsuit as one against the defendant in his official capacity," citing *Wells*, *Whittington, Hardin, Thikol*; distinguishing *Pelfrey* on the grounds that the plaintiff took no action to clarify capacity in more than three months after the defendants filed motions to dismiss); *Sharp v. Ray*, 103 F.3d 130, 1996 WL 721783, at *1 (6th Cir. 1996) (order) (holding

that the defendant was not subject to suit for monetary damages because the plaintiff did not specify the capacity in which he sued the defendant, and it was therefore presumed that he was sued in his official capacity, citing *Wells*); *Na'im v. Bradley*, 103 F.3d 130, 1996 WL 719880, at *1 (6th Cir. 1996) (order) (same); *Sawyer v. Traughber*, 103 F.3d 130, 1996 WL 711593, at *1 (6th Cir. 1996) (order) (same); *Mullins v. Cranston*, 103 F.3d 130, 1996 WL 708241, at *1 (6th Cir. 1996) (order) (same); *Harris v. Muchnicki*, 101 F.3d 702, 1996 WL 665582, at *2 (6th Cir. 1996) (order) (same); *Mullins v. Zent*, 98 F.3d 1342, 1996 WL 583415, at *1 (6th Cir. 1996) (order) (same); *Alexander v. Margolis, 98* F.3d 1341, 1996 WL 583365, at *1 (order) (holding that summary judgment to defendants was proper because the plaintiff sued the defendants in their official capacities for which monetary relief is not available, citing *Wells*); *Long v. McGinnis*, 97 F.3d 1452, 1996 WL 528943, at *2 (6th Cir. 1996) (per curiam) (*Wells* standard met for two defendants because the complaint specified that the two defendants were sued in both their official and individual capacities, but not met for a third defendant because the compliant did not indicate the capacity in which that defendant was sued); *Besser v. Wilkinson*, 97 F.3d 1451, 1996 WL 509463, at *1 (6th Cir. 1996) (order) (because the plaintiff did not specify the capacity in which he sued the state defendants for money damages, state official was construed to be sued in his official capacity under *Wells* and therefore not subject to suit for money damages); *Hodges v. Tennessee*, 95 F.3d 1152, 1996 WL 494277, at *1 (6th Cir. 1996) (order) (same); *Williams v. Secor*, 95 F.3d 1153, 1996 WL 469151, at *1 (6th Cir. 1996) (order) (same); *McManaway v. Sapienza*, 94 F.3d 645, 1996 WL 338602, at *1 (6th Cir. 1996) (order) (defendants were not subject to suit for monetary damages because the plaintiff only sued the

defendants in their official capacities, citing *Will* and *Wells*); *Lyle v. Koole,* 89 F.3d 834, 1996 WL 316515, at *1 (6th Cir. 1996) (order) (because the plaintiff failed to allege in his complaint the capacity in which he was suing the defendant, the defendant was considered sued in his official capacity under *Wells* and not subject to suit for monetary damages); *Barrett v. Lane*, 83 F.3d 422, 1996 WL 196222, at *1 (6th Cir. 1996) (order) (same); *Wilson v. Lane*, 82 F.3d 419, 1996 WL 185788, at *1 (6th Cir. 1996) (order) (same); *Kersey v. Tenn. Bd. of Paroles*, 82 F.3d 418, 1996 WL 185779, at *1 (order) (same); *Hayden v. Combest*, 72 F.3d 129, 1995 WL 712801, at *1 (6th Cir. 1995) (order) (same); *Adams v. Upper*, 67 F.3d 299, 1995 WL 570915, at *1 (6th Cir. 1995) (order) (same); *Frederick v. Abramajtys*, 66 F.3d 325, 1995 WL 564321, at *1 (6th Cir. 1995) (order) (same); *Taylor v. Spier*, 57 F.3d 1070, 1995 WL 329450, at *1 (6th Cir. 1995) (order) (same); *Mercer v. Noble*, 52 F.3d 326, 1995 WL 234612, at *1 (6th Cir. 1995) (order) (same); *Sweet v. Sutherland*, 52 F.3d 326, 1995 WL 218458, at *2 (6th Cir. 1995) (order) (same); *Luna v. Sutherland*, 52 F.3d 325, 1995 WL 218452, at *2 (6th Cir. 1995) (order) (same); *Julian-Bey v. Upchurch*, 46 F.3d 1131, 1995 WL 45626, at *1 (6th Cir. 1995) (order) (same); *Hill v. Wilkinson*, 47 F.3d 1169, 1995 WL 37933, at *1 (6th Cir. 1995) (order) (same); *Callihan v. Kentucky,* 47 F.3d 1167, 1995 WL 27404, at *1 (6th Cir. 1995) (order) (same); *Berry v. O'Connell*, 42 F.3d 1388, 1994 WL 664943, at *1 (6th Cir. 1994) (same); *Thomas v. Mich. State Bd. of Law Exam'rs*, 41 F.3d 1508, 1994 WL 659148, at *2 (6th Cir. 1994) (order) (same); *Berry v. Allen,* 38 F.3d 1215, 1994 WL 560879, at *1(6th Cir. 1994) (order) (same); *Donald v. Mendel*, 30 F.3d 133, 1994 WL 276869, at *1 (6th Cir. 1994) (order) (same); *Kirk v. Griner*, 25 F.3d 1048, 1994 WL 198177, at *2 (6th Cir. 1994) (order) (same);

Meehan v. Pardue, 23 F.3d 407, 1994 WL 163730, at *1 (6th Cir. 1994) (order) (same); *Prunty v. Wilson*, 19 F.3d 1434, 1994 WL 91844, at *1 (6th Cir. 1994) (order) (same); *Wilson v. Village of Cassopolis*, 16 F.3d 1224, 1994 WL 49565, at *1 (6th Cir. 1994) (order) (same); *Grote v. McGinnis*, 12 F.3d 212, 1993 WL 478851, at *1 (6th Cir. 1993) (order) (same); *Hitchcock v. Fowler*, 12 F.3d 212, 1993 WL 476990, at *1 (6th Cir. 1993) (order) (same); *Boswell v. Lundstrom*, 9 F.3d 106, 1993 WL 428155, at *1 (6th Cir. 1993) (order) (same); *Smith-El v. Jensen*, 4 F.3d 994, 1993 WL 326711, at *1 (6th Cir. 1993) (order) (same); *Hunt v. Reynolds(After Remand)*, 2 F.3d 1151, 1993 WL 309776, at *1 (6th Cir. 1993) (order) (same; holding in the alternative that, even if the plaintiff alleged an individual capacity suit, the district court properly found the defendants were entitled to qualified immunity); *Martin v. O'Dea*, 999 F.2d 540, 1993 WL 243836, at *1 (6th Cir. 1993) (order) (noting that the plaintiff did not allege capacity in which he sued the defendants and that under *Wells* the defendants are construed to be sued in their official capacities and therefore not subject to suit for money damages); *Woods v. Dahlberg*, 996 F.2d 1218, 1993 WL 241822, at *2 (6th Cir. 1993) (order) (same); *Taylor v. Mich. Dep't of Corrs.*, 996 F.2d 1217, 1993 WL 210884, at *1 (6th Cir. 1993) (order), (same); *McDonald-El v. Anthony*, 996 F.2d 1215, 1993 U.S. App. LEXIS 15341, at *2-3 (6th Cir. 1993) (order) (noting that the plaintiff's claims for damages against the state defendants in their official capacity are barred by the Eleventh Amendment, affirming district court's grant of summary judgment to defendants); *Carmen's East, Inc. v. Huggins*, 1993 U.S. App. LEXIS 13093, at *1,(published in table format at 995 F.2d 1066) (6th Cir. 1993) (Merritt, J.) (holding that *Wells* standard was met because the defendants

were sued in their individual capacities); *Russell v. Potts,* 991 F.2d 796, 1993 WL 94033, at *1 (6th Cir. 1993) (order) (holding that the plaintiff's complaint failed to specify in what capacity he was suing the defendants; court was therefore required to assume that he was suing the defendants in their official capacity; citing *Wells*); *Rich v. Brown*, 1993 U.S. App. LEXIS 6649, at *3, (published in table format at 989 F.2d 500) (6th Cir. 1993) (order) (noting that the state defendants were not subject to suit for monetary damages under §1983, citing *Will* and *Wells*); *Staffney v. Robledo,* 985 F.2d 561, 1993 WL 20539, at *2 (6th Cir. 1993) (order) (holding that the defendants were sued in their official capacities as state employees because the complaint did not indicate that they were being sued personally, and were therefore immune from §1983 damages, citing *Wells*); *Jones v. Calkins*, 985 F.2d 560, 1993 WL 20992, at *1 (6th Cir. 1993) (order) (same); *Frederick v. Tennessee,* 985 F.2d 559, 1993 WL 15157, at *1 (6th Cir. 1993) (order) (assuming as a matter of law that several defendants were served in their official capacity because the complaint did not indicate that they were being sued as individuals, and that they were therefore not "persons" subject to liability under §1983, citing *Wells*); *Wingard v. Smith*, 980 F.2d 732, 1992 WL 340939, at *1 (6th Cir. 1992) (order) (affirming district court's judgment for defendants because the defendants, in their official capacities, are not "persons" subject to suit for monetary damages under §1983, citing *Will*; and noting that "even pro se plaintiffs must specify that they are suing state officials in their individual capacities in order to avoid dismissal on this ground"; citing *Wells*); *Simpson v. Hawley,* 959 F.2d 236, 1992 WL 70161, at *1 (6th Cir. 1992) (order) (same, on plaintiff's concession); *Kirk v. Negendank*, 959 F.2d 234, 1992 WL 64751, at *1 (6th Cir. 1992) (per curiam)

(holding that the court lacked jurisdiction over the state defendant's appeal because the plaintiff's pleadings did not satisfy the *Wells* standard that individual capacity be specifically pled); *Peak v. Smith*, 959 F.2d 235, 1992 WL 60194, at *2 (6th Cir. 1992) (order) holding that the plaintiffs were barred from seeking monetary relief because the complaints did not indicate that the defendants were being sued personally, citing *Wells*); *Butts v. Yarborough,* 1992 U.S. App. LEXIS 3464, at *6 (published in table format at *956 F.2d 268) (6th Cir. 1992)* (order) (holding that several defendants were not liable for monetary damages under § 1983 because they were named in their official capacities only, in contrast with other defendants who were specifically sued in their individual and official capacities; citing *Wells*); *Swartz v. Hurt*, 954 F.2d 725, 1992 WL 21557, at *1 (6th Cir. 1992) (order) (holding that the defendants were sued in their official capacity because the complaint did not indicate that they were being sued personally, and as such, the defendant state employees were immune from damages under §1983; citing *Wells*); *Fleetwood v. Brown,* 947 F.2d 944, 1991 WL 225559, at *1 (6th Cir. 1991) (order) (same); *Johnson v. Bently*, 945 F.2d 404, 1991 WL 191554, at *2 (6th Cir. 1991) (per curiam) (same, also noting that the court lacked jurisdiction over the plaintiff's damages claim); *Berryman v. Johnson*, 940 F.2d 658, 1991 WL 150808, at *1, 7-8 (6th Cir. 1991) (Nelson, J.) (*Wells* standard of clearly pleading individual capacity met because the complaint alleged that the defendants were sued in both their official capacities and their individual capacities); *Gentry v. Rollins,* 1991 U.S. App. LEXIS 17577, at *2 (6th Cir. 1991) (order) (holding that the plaintiff's claim for monetary damages against the defendants was barred under the Eleventh Amendment where the complaint merely alleged that the

defendants acted "in their respective professional capacity"; citing *Will* and *Wells*); *Wilson v. Jabe*, 936 F.2d 574, 1991 WL 105762, at *1 (6th Cir. 1991) (order) (holding that the plaintiff's claims for monetary relief lacked an arguable basis in law because he failed to specify that state defendants were sued in their individual capacities; citing *Wells* and *Will*); *Boswell v. Toombs*, 936 F.2d 572, 1991 WL 105760, at *1 (6th Cir. 1991) (order) (same); *Gallagher v. Yeagley*, 933 F.2d 1008, 1991 WL 80707, at *1 (6th Cir. 1991) (order) (same); *Ambrose v. Brown*, 932 F.2d 967, 1991 WL 78805, at *1 (6th Cir. 1991) (order) (same); *Childs v. Koosed*, 928 F.2d 404, 1991 WL 33133, at *2 (6th Cir. 1991) (per curiam) (holding that because the plaintiff did not clearly notify the defendants that they could be personally liable for damages under § 1983, the suit was against the defendants' offices and thereby against the University; citing *Wells*); *Martin v. Whalen*, 927 F.2d 604, 1991 WL 23538, at *1 (6th Cir. 1991) (order) (holding that the plaintiff was barred from receiving a monetary judgment because the complaint did not indicate that the state employees were being sued personally; citing *Wells*); *Rodgers v. Brown*, 925 F.2d 1465, 1991 WL 16474, at *1 (6th Cir. 1991) (order) (§1983 damages action was properly dismissed because the plaintiff did not indicate that he intended to sue the state defendant in his individual capacity; citing *Will* and *Wells*); *Justice v. Brown*, 925 F.2d 1464, 1991 WL 16460, at *2 (6th Cir. 1991) (order) (same); *Buchanan v. Wilkinson*, 925 F.2d 1462, 1991 WL 16463, at *1 (6th Cir. 1991) (order) (same; citing *Wells* only); *El-Amin v. Brown*, 1991 U.S. App. LEXIS 2162, at *3 (published in table format at 925 F.2d 1463) (6th Cir. 1991) (order) (same; citing *Will* and Wells); *Favors v. Barnett*, 924 F.2d 1058, 1991 WL 15150, at *1 (6th Cir. 1991) (order) (same); *Moore v. Dahlberg,, 1991 WL 924 F.2d 1058 11249,* at *1 (6th Cir.

1991) (order) (noting that the plaintiff's claim for monetary relief is barred by the Eleventh Amendment because his complaint does not show that the defendants were sued as individuals rather than in their official capacity as state employees; citing *Wells*); *Bass v. Reynolds*, 920 F.2d 932, 1990 WL 201401, at *1 (6th Cir. 1990) (order) (suit was properly dismissed to extent the plaintiff sought damages, stating that "even pro se plaintiffs must specify that they are suing state officials in their individual capacities in order to avoid dismissal on this ground"; citing *Will* and *Wells*); *Gongolewski v. Lexington-Fayette Urban County Gov't*, 920 F.2d 932, 1990 WL 200378, at *2 (6th Cir.1990) (per curiam) (noting that a court should examine a complaint's heading and body when determining the capacity in which a defendant is sued; holding that the complaint did not state claims against the individual defendants in their individual capacities, and that the plaintiff was not entitled to have individual capacity liability submitted to the jury; citing *Wells* and *Norman*); *Hughes v. Perry*, 918 F.2d 957, 1990 WL 180911, at *1 (6th Cir. 1990) (order) (holding that the plaintiff's claim lacked an arguable basis in law as immune under the Eleventh Amendment because the complaint did not allege that the state defendant was being sued personally, and under *Wells* it may be assumed that the defendant was sued in his official capacity only); *Bantu v. Coleman*, 918 F.2d 178, 1990 WL 177393, at *1 (6th Cir. 1990) (order) (same); *Musick v. Wigginton*, 916 F.2d 713, 1990 WL 155625, at *1-2 (6th Cir. 1990) (order) (holding that the plaintiff could not avoid the affirmative duty to plead the capacity in which she sues the defendant; citing *Wells*); *Murray v. Ohio Adult Parole Auth.*, 1990 U.S. App. LEXIS 18358, at *4 (published in table format at 916 F.2d 713) (6th Cir. 1990) (order) (holding that state defendant, sued in his official capacity was

immune from suit for monetary damages; citing *Wells* and *Will*); *Dickens v. Withrow*, 915 F.2d 1571, 1990 WL 153944, at *2 (6th Cir. 1990) (order) (holding that the defendant was not subject to suit for monetary damages under §1983 where the plaintiff did not plead the capacity in which the defendants were sued; citing *Wells*); *Carter v. Jabe*, 1990 U.S. App. LEXIS 18080, at *5 (published in table format at 915 F.2d 1570) (6th Cir. 1990) (state defendants not liable for monetary damages because the plaintiff did not name the defendants in their individual capacity; citing *Will* and *Wells*); *Walton v. Dallman*, 915 F.2d 1574, 1990 WL 146915, at *1 (6th Cir. 1990) (order) (because the plaintiff characterized each official's conduct in terms of their official capacities, the plaintiff's claims for monetary relief were properly dismissed for lack of jurisdiction; citing *Will* and *Wells*); *Chandler v. Clark*, 1990 U.S. App. LEXIS 17005, at *2 (published in table format at 914 F.2d 255) (6th Cir. 1990) (order) (holding that the defendants were not subject to suit because the plaintiff sought to hold them liable in their official capacity for monetary damages under §1983; citing *Will* and *Wells*); *Maniece v. Kentucky*, 914 F.2d 1494, 1990 WL 140568, at *1 (6th Cir. 1990) (order) (holding that damages suit against individual state defendant was barred, as he was named in his official capacity; citing *Wells*); *Leibowitz v. United States,* 914 F.2d 256, 1990 WL 126422, at *1 (6th Cir. 1990) (per curiam) (holding that where nothing on the face of the complaint suggested that the three employees had been sued other than in an official capacity, under *Wells* it was "clear that the complaint failed to make the requisite showing of jurisdiction with respect to these defendants"); *See v. Collins,* 911 F.2d 733, 1990 WL 120959, at *1 (6th Cir. 1990) (order) (same); *Hughes v. Avery*, 911 F.2d 732, 1990 WL 116530, at *1 (6th Cir. 1990) (order) (because the plaintiff did not

plead the capacity in which the defendants were sued as required by *Wells*, the state defendant was sued in her official capacity and not subject to suit for monetary damages; citing *Will*); *Green v. Smith*, 909 F.2d 1483, 1990 WL 115939, at *1 (6th Cir. 1990) (order) (same); *Carter v. Jones*, 905 F.2d 1537, 1990 WL 86699 (6th Cir. 1990) (order) (noting that dismissal was appropriate because the complaint completely failed to set forth clearly that the plaintiff was suing the state defendants in their individual capacity for damages; citing *Wells*); *Person v. Norris*, 904 F.2d 708, 1990 WL 75250, at *2 (6th Cir. 1990) (order) (same); *Haynie v. Tenn. State Penitentiary & Hosp.*, 1990 U.S. App. LEXIS 9938, at *2-3 (published in table format at 904 F.2d 707) (6th Cir. 1990) (order) (same); *Lowe v. Huffstutler*, 1990 U.S. App. LEXIS 8351, at *5 (published in table format at 902 F.2d 1569) (6th Cir. 1990) (order) (holding that the plaintiff was not entitled to collect money damages from any of the state defendants because he failed to allege that they were being sued personally rather than in their official capacities as state employees; citing *Will* and *Wells*); *Murphy v. Bently*, 902 F.2d 1569, 1990 WL 63554, at *1 (6th Cir. 1990) (order) (same); *See v. Wilkinson*, 902 F.2d 1569, 1990 U.S. App. LEXIS 7832, at * 2 (6th Cir. 1990) (order) (same); *Rice v. Doyle*, 902 F.2d 1569, 1990 U.S. App. LEXIS 7807, at *2 (6th Cir. 1990) (order) (same); *Taylor v. Shull*, 902 F.2d 35, 1990 U.S. App. LEXIS 7097, at *2 (6th Cir. 1990) (order) (same); *Haynie v. Bass*, 902 F.2d 33, 1990 WL 57239, at *1-2 (6th Cir. 1990) (order) (same); *Latham v. Ky. Corrs. Cabinet*, 900 F.2d 260, 1990 U.S. App. LEXIS 5915, at *2-3 (6th Cir. 1990) (same); *Hopkins v. Kerns*, 899 F.2d 1222, 1990 U.S. App. LEXIS 5277, at *4-5 (6th Cir. 1990) (order) (same); *Fite v. Hesson*, 898 F.2d 153, 1990 U.S. App. LEXIS 3974, at *3 (6th Cir. 1990) (order) (same); Gibbs v.

Norman, 898 F.2d 153, 1990 U.S. App. LEXIS 3701, at *4, 7 (6th Cir. 1990) (order) (same); *Wilson v. Seiter*, 897 F.2d 530, 1990 U.S. App. LEXIS 3557, at *5 (6th Cir. 1990) (order) (same); *Johnson v. Mandenberg*, 893 F.2d 1334, 1990 WL 3815, at *3-4 (6th Cir. 1990) (per curiam) (holding that the *Wells* standard of clearly pleading individual capacity in the complaint was not met where the complaint merely averred that the defendants "were acting in their official capacities" and did not allege that they were sued in their individual capacities). *But see Perry v. Croucher*, 165 F.3d 28, 1998 WL 661151, at *7-8 (6th Cir. 1998) (looking first to complaint, which had at least one claim merely alleging individual conduct, then looking to subsequent conduct of parties to substantiate that defendants had notice); *Harris v. Morris*, 983 F.2d 1066, 1993 WL 2303, at *3-4 & n.2 (6th Cir. 1993) (per curiam) (noting that the plaintiff did not state in his complaint that he was suing any of the individual defendants in their official capacity and acknowledging the complaint was not a "model of clarity," but nonetheless holding that individual capacity was properly pled as to three defendants based on allegations in body of complaint stating, *inter alia*, that the defendants were aware of the plaintiff's complaints but failed to investigate, and that each of the defendants continually placed the plaintiff in life threatening situations); *Carr v. Blanchard*, 954 F.2d 724, 1992 WL 24900, at *1 (6th Cir. 1992) (order) (vacating dismissal on grounds of *Wells* and remanding for reconsideration because the plaintiff sought to amend his complaint to sue defendants in their individual capacity and court improperly denied the motion in light of *Hafer*); *Cox v. Sapp*, 908 F.2d 972, 1990 WL 106181, at *2 (6th Cir. 1990) (per curiam) (Wells not met, but construing complaint generously because it was filed prior to Wells and was only against the individual defendant

and did not name the Commonwealth of Kentucky or any department as a party); *but see also Krusinski v. USDA*, 4 F.3d 994, 1993 WL 346858, at *3-4 (6th Cir. 1993) (per curiam) (reversing in part on grounds that each defendant was named individually in the complaint for actions exceeding scope of his official duties but without citation to Wells); *Id.* at *5 (Suhrheinrich, J., dissenting) (noting complaint failed to indicate capacity as required by *Wells*; reviewing entire complaint).

The inescapable conclusion to be drawn from this catalog of published and unpublished decisions is this Court has predominantly viewed the *Wells* rule as requiring plaintiffs to affirmatively plead personal capacity in the complaint. That the bulk of these decisions are unpublished is significant because it suggests that numerous panels of this Court have perceived the application of the rule as routine. *Cf.* 6 Cir. R. 206 ("Publication of Decisions" - establishing criteria to be considered by panels in determining whether a decision will be designated for publication; including *inter alia*, "whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation").

Ironically, the majority relies on the only two decisions which deviate from a straightforward application of the *Wells* rule. In *Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir. 1995), the defendants, state corrections officials, argued that the plaintiff's §1983 complaint should be dismissed under *Wells* because the plaintiff's complaint did not specify that he was suing the defendant correctional officers in their individual capacities. *Id.* at 1037-38. The district court dismissed the complaint, and the plaintiff

appealed. This Court reversed.

The *Pelfrey* court acknowledged the rule of *Wells*, as well as its rationale:

> In *Wells*, this Court held that inmates seeking damages under §1983 were required to set forth clearly in their pleadings that they were suing state officials in their individual capacities as state officials. The rationale behind this requirement was to afford state officials *sufficient* notice of the fact that they could be held personally liable for the payment of any damage award obtained by the plaintiff. Absent specific notice, the court held that it would construe an ambiguous complaint as a complaint against the officers in their official capacities.

Id. at 1038 (citations omitted) (emphasis added). *Pelfrey* nonetheless distinguished *Wells*, even though the complaint did not specify whether the defendants were being sued in their individual or official capacities, because one month after the complaint was filed, the plaintiff filed a motion to bar the Ohio Attorney General from representing the defendants. Further, in the motion, the plaintiff specifically stated that the defendants acted outside the scope of their employment and in bad faith. *Id.* The *Pelfrey* court ruled that, "[b]ased on this pleading, we believe that defendants were given *sufficient* notice of the fact that they were being sued in their individual capacity." *Id.* (emphasis added). Furthermore, because the plaintiff's case was dismissed at an early stage in the proceedings, the failure to plead capacity could be cured by

an amendment to the complaint under Fed. R. Civ. P. 15(a). *Id.*

The *Pelfrey* court premised its ruling on the fact that the defendants received "sufficient" notice that they were being sued in their individual capacities; namely only one month after the complaint had been filed, and well within the time for amendment of the complaint. In so ruling, the *Pelfrey* court expressly tied its holding to the notice rationale of *Wells*. Thus, although not in strict compliance with the rule of *Wells*, *Pelfrey* is consistent with *Wells* because it satisfied one of the overarching goals of *Wells* - to provide early notice to defendants of the potential for individual liability.[10]

The *Pelfrey* court never used the term "course of proceedings," or cited to any other Circuit that had adopted such a rule. Rather, it represents a narrow exception to the *Wells* rule, limited by the peculiar facts of that case; namely the plaintiff's clarifying motion, filed only one month after the complaint. *Pelfrey* cannot be read as adopting a broad "course of proceedings" test.

The other case relied on by the majority - indeed the one the majority deems controlling - is *Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489 (6th Cir. 1995) (order). In *Abdur-Rahman*, Abdur-Rahman, a pro se prisoner, sued the Michigan Department of Corrections and Kenneth

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[10] Curiously, the *Pelfrey* court did not discuss the Eleventh Amendment, even though the defendant officers were state employees. The oversight is difficult to understand, given the jurisdictional implications.

McGinnis, the Director of the Department. The plaintiff did not indicate the individual defendant's capacity. *Id.* at 491. Without referring to *Wells*, the court ruled:

> In his complaint, Rahman did not state in what capacity he sued McGinnis. However, in his reply to McGinnis's motion for summary judgment, Rahman makes clear that he intended to sue McGinnis in his individual and official capacities. Under *Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir.), *cert. denied*, . . . 515 U.S. 1116, 115 S. Ct. 2269, 132 L. Ed. 2d 273 (1995), Rahman's response to McGinnis's motion for summary judgment is sufficient notice to McGinnis that he is being sued in his individual capacity.

Id.

Abdur-Rahman cannot be reconciled with *Wells*. It is undisputed that the complaint did not indicate capacity. Thus, under *Wells*, by operation of law the defendant was sued in his official capacity only. Further, the defendant in *Abdur-Rahman* did not receive notice that he was being sued in his individual capacity until the plaintiff filed his response to the defendant's motion for summary judgment, obviously outside of pleading and after discovery had closed. Thus, the ruling in *Abdur-Rahman* also runs afoul of the notice rationale of *Wells*, because the defendant would not have been able to develop a legal strategy consistent with a personal capacity suit, let alone avoid suit altogether by invoking qualified immunity. For this latter reason *Abdur-Rahman* is also inconsistent with *Pelfrey*, and its reliance on that case is therefore improper. Finally, although the majority fails to

note it, *Abdur-Rahman* is merely a published order, and, as such, is entitled to less weight than other published opinions.

In sum, apart from *Pelfrey* and *Abdur-Rahman*, we have strictly applied the *Wells* standard. Moreover, the dearth of reference to *Pelfrey* in our precedent illustrates that we have construed that case narrowly and kept it constrained to its peculiar facts. Indeed, the few references to *Pelfrey* in our unpublished cases demonstrate that we generally view the case as requiring affirmative conduct on the part of the plaintiff to clarify the nature of his suit in a timely manner. *See, e.g.*, *Cummings*, 1998 U.S. App. LEXIS 4519, 1998 WL 30803, at *1-2 (plaintiff never acted to clarify capacity); *Harvest*, 1996 WL 733130, at *1-2 (plaintiff failed to clarify capacity after more than three months).

With one minor exception, the majority's decision is contrary to long-standing Sixth Circuit precedent. Although the majority pays lip-service to the *Wells* rule, what it is really doing is adopting a course of proceedings test. It is disingenuous to do so without explicitly overruling *Wells*. In my view, it is *Abdur-Rahman* that should be overruled.

II.

Because we are sitting en banc, we of course are free to establish a new rule. However, there are no solid reasons for modifying the *Wells* rule. First of all, the majority's decision makes no sense. Needless to say, if it takes a significant course of proceedings to clarify the capacity in which the defendants are sued, then capacity could not have been clearly pled in the first instance. *Wells* and the course of proceedings test are inconsistent with each other.

More importantly, the *Wells* rule gives effect to important jurisdictional and jurisprudential concerns. The course of proceedings analysis subverts these principles. If a state actor is sued for damages, the federal court may not have jurisdiction because of the Eleventh Amendment, unless the suit is against the official in his individual capacity. Because it may have no authority to act, a federal court must determine at the outset whether it has jurisdiction to decide the case. *See, e.g., United States v. United Mine Workers of America*, 330 U.S. 258, 291, 91 L. Ed. 884, 67 S. Ct. 677 (1947) (courts have jurisdiction to determine their own jurisdiction); *Fireman's Fund Ins. Co. v. Railway Express Agency*, 253 F.2d 780, 784 (6th Cir. 1958); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 591 (7th Cir. July 3, 2001). Yet the majority rule potentially allows a court to exercise jurisdiction that it may not really have during the protracted "course of proceedings." In short, the course of proceedings test advanced by the majority is in tension with the concept of limited federal jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) (federal courts are courts of limited jurisdiction; they exercise only that authority conferred on them by Article III and congressional enactments pursuant thereto).

Similarly, the notice rationale serves to alert defendants at the lawsuit's inception whether they will be personally liable for damages. Without such timely notice defendants might rely on their governmental employer, fail to answer, and be subject to default judgment in their personal capacities. Further, without early notice government defendants cannot properly decide whether to retain independent counsel or to participate in collective defense

strategies or settlement negotiations. Nor would the individual defendants be able to assess how best to engage in discovery. Under the course of proceedings analysis, individual capacity defendants are deprived of the ability to make a multitude of decisions regarding their own defense.

Without that notice, a government defendant may also fail to plead the affirmative defense of qualified immunity and thereby waive the defense. *See Harlow*, 457 U.S. at 815 (qualified immunity is an affirmative defense which must be pled); *English v. Dyke*, 23 F.3d 1086, 1089-90 (6th Cir. 1994).[11] By waiving the defense, the defendant may lose the

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[11] As *English* makes clear:

> Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense. The defense is subject to the same procedural rules as other defenses. Thus, as this Court recently held in an unpublished opinion, a failure to assert the defense in a pre-answer motion to dismiss waives the right to raise the issue in a second *pre-answer* motion to dismiss. In addition, a defendant may waive his right to appeal a denial of qualified immunity if he fails to file a timely appeal. Moreover, the trial court has discretion to find a waiver if a defendant fails to assert the defense within time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes. Such a waiver, however, need not waive the defense for all purposes but would generally only waive the defense for the stage at which the

protections of the doctrine, which provides an immunity not only from liability, but from suit. *See Harlow*, *supra*[12]; *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (qualified immunity provides not merely immunity from liability, but an "immunity from suit"); *English*, 23 F.3d at 1089.[13] This in turn defeats the

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> defense should have been asserted. Thus, for example, a defendant who fails to timely assert the defense prior to discovery may waive the right to avoid discovery but may nonetheless raise the issue after discovery on summary judgment or at trial.

English, 23 F.3d at 1090 (citations, quotations, and footnote omitted).

[12] In *Harlow*, the Supreme Court altered the standard of qualified immunity by defining immunity in wholly objective terms, unlike earlier cases which used a subjective, good-faith defense, because the subjective test "frequently [had] proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16. Thus, *Harlow* held that government officials performing discretionary functions "are shielded from liability for civil damages insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court concluded that this objective standard would "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.*

[13] It is for this reason that denials of qualified immunity are immediately appealable, because an error below cannot be remedied post-judgment on appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and

longstanding public policy of encouraging public service by protecting government officials from frivolous but nonetheless debilitating litigation. *See, e.g., Harlow*, 457 U.S. at 816 (observing that substantial costs attend the litigation against public officials, including "the general costs of subjecting officials to the risks of trial--distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"); *Mitchell*, 472 U.S. at 526 (same; quoting *Harlow*); *Anderson v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) ("permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); *see also Wyatt v. Cole*, 504 U.S. 158, 167-68, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992) (noting that Supreme Court has consistently recognized qualified immunity for government officials "where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service"; listing cases). Under the course of proceedings analysis, the protections of the qualified immunity doctrine are largely lost.

The majority's new rule inexplicably tips the balance in favor of inept pleading and improperly places the burden on government defendants to ferret out whether they are being sued personally. The practical effect of the majority's test is that every government defendant, when faced with an

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like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

ambiguous complaint, a complaint that is silent on the question of capacity, or even a complaint that clearly only alleges an official capacity suit, will have to file a motion for a more definite statement in order to ensure that they are *not* being sued in their individual capacity. The plaintiff is the master of his complaint, and it is not too much to ask that he plead his claims properly. *Cf. Caterpillar Inc. v. Williams,* 482 U.S. 386, 398-99, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987) (observing "the paramount policies embodied in the well-pleaded complaint rule--that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court"). Nor should we allow lax plaintiffs to put courts in the position of divining whether a defendant should have understood that he was being sued in his personal capacity. As we stated in *Wells*, "the trial and appellate courts should not have to guess at the nature of the claim asserted." *Wells*, 891 F.2d at 594.

We as a nation encourage public service. However, public service often means lower pay than a position in the private sector. Furthermore, many government agencies do not cover the legal fees or judgments of their employees for acts performed in their individual capacities. Such lawsuits not only affect these defendants' financial resources, but also have a great impact on their emotions and their reputations, both professional and personal. I find it strange that we ask all this of people who agree to perform public service, but then we fail to provide them the courtesy of early notice that they may be individually liable for acts arising out of that service.

The majority's approach is also inconsistent with the

tenor of the Federal Rules of Civil Procedure. The fundamental purpose of the Rules is "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (noting that Rule 56 of the Federal Rules of Civil Procedure is in accord with the primary purpose of Federal Rules as stated in Fed. R. Civ. P. 1). "The application of orderly rules of procedure does not require the sacrifice of fundamental justice, but rather the Rules must be construed to promote justice for both parties, not to defeat it. This mandate is met if substantial justice is accomplished between the parties." 1 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, ¶ 1.21[1][a] (3d ed. 2001).[14]

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[14] The concept of substantial justice for both parties through the orderly application of rules of procedure permeates the Rules. For example, the Rules provide that if service is not made upon a defendant within 120 days after the complaint if filed, the court shall dismiss the action without prejudice unless the plaintiff shows good cause. Rule 4 further allows amendments to summons. Fed. R. Civ. P. 4(a). This ensures defendants are timely notified of suits against them, but ensures an opportunity for plaintiffs to correct oversights. Rule 4 also offers opportunities for parties to save costs on cooperation regarding waiver of service. Fed. R. Civ. P. 4(d). A defendant has twenty days upon receipt of the summons and complaint to serve an answer, Fed. R. Civ. P. 12(a)(1), but may be subject to default if he fails to answer or otherwise defend the action. Fed. R. Civ. P. 55(a). A defaulted defendant, however, has two avenues of recourse, under Fed. R. Civ. P. 55(c) and 60(b).

The Rules are also liberal in allowing a party to amend his pleading. *See* Fed. R. Civ. P. 15(a). At the same time, however, an

The course of proceedings test does not guarantee substantial justice for defendants because it allows a plaintiff to belatedly salvage an ambiguous or even nonexistent assertion of capacity. A defendant, to his surprise, might learn for the first time in a response to a summary judgment motion that he may be personally liable for money damages. *Cf. Abdur-Rahman*, 65 F.3d at 491. Such a result is costly and inefficient because the defendant would have to conduct additional discovery and motion practice, and revise his trial preparation and strategy. All of this can be avoided, however, if the plaintiff follows the rules and pleads capacity properly in the complaint. The defendant can then raise the affirmative defense of qualified immunity in his very first pleading, be it an answer or motion to dismiss, and then conduct discovery and motion practice if necessary. Judicial resources would also be conserved.

The *Wells* rule, as it has been consistently applied in this Circuit to require clear notice of individual capacity in the pleadings, promotes fundamental jurisdictional and

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amendment, even one that pertains to the same transaction or occurrence, does not relate back when the amendment is one that changes a party, the intended party did not receive notice within the period for service of process under Rule 4(m), i.e., 120 days, there is prejudice to the party to be brought in, and the intended party did not know or have reason to know that, but for a mistake, the action would have been brought against him. Fed. R. Civ. P. 15(c)(3).

I need not illustrate the point through every rule, but it is apparent that the Federal Rules of Civil Procedure balance the competing interests of plaintiffs and defendants by setting up an orderly and finite procedure from complaint to judgment.

jurisprudential doctrines. The course of proceedings test does not. For this reason, I submit that the rule crafted by the majority is ill-advised.

III.

The Complaint fails to allege personal capacity under *Wells* and progeny because it does not clearly plead it. Indeed, it does not use the term "capacity" at all. However, even under the majority's expansive "course of proceedings" test, the district court's dismissal of plaintiff's complaint was proper.

I begin, as I must under either test, with Plaintiff's Complaint, which is set forth in its entirety as an appendix to this opinion. The caption of the Complaint reads as follows:

Ralph Moore, Jr.
521 Sheldon Rd.
Harriman, TN 37748

Plaintiff

vs.

City of Harriman, Tennessee,
Harriman Police Department,
Roy Jenkins, Chief of Police,
Darren McBroom, Terry Fink,
Randy Heidle, Virgil McCart,
and Jerry Singleton

Harriman Police Department
302 Roane St.

Harriman, TN 37748

Defendants

As noted, the caption does not indicate the capacity of any of the defendants. However, the majority finds significance in the fact that the Complaint lists only the officers' names, not their official titles. I do not know that this signifies anything. Entities can only act through their agents, *see Poindexter v. Greenhow*, 114 U.S. 270, 288, 29 L. Ed. 185, 5 S. Ct. 903 (1885) ("[t]he State is a political corporate body, [and] can only act through agents"). Thus, "official capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Hafer v. Melo*, 502 U.S. 21, 25, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)); *see also id.* at 27 (noting that "[s]tate officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them").

Similarly, the terms "individual capacity" or "personal capacity" are also never mentioned in the body of the Complaint. Contrary to the majority's assertion that "[t]he complaint refers to the officers throughout as the (individual defendants), *ante*, at 7, the phrase is used only once, in the paragraph describing the parties to the action. Again, the reference, without a designation to "individual capacity," does not clarify that the suit against the individual defendants was in their individual and not official capacities. Under *Wells*, the "passing reference" to a government defendants' personal involvement asserting that they participated in certain events

is not sufficient to notify them that they may be personally liable for damages. *See Wells*, 891 F.2d at 593.

Furthermore, the full passage reads as follows: "The other individual defendants were at all times relevant to this action officers of the City of Harriman Police Department and *were acting in the course of their employment and in furtherance of the business of the City*." Complaint, ¶ 1(c) (emphasis added). This statement fairly implies that Plaintiff was suing the individual defendants in their capacity as agents of the Police Department. This reading is reinforced in Paragraph 15 which explicitly states that the actions of the defendants were taken as part of their official duties: "At all times relevant to this action the said officers were employees and/or agents of the City of Harriman. *All of the said actions of the said officers were taken in the course of and in the scope of their employment by the City*, for which the City and the defendant police chief Jenkins are liable vicariously, according to the principles of *respondeat superior*." *Id.*, ¶ 15 (Emphases added.) Even under the majority's selectively-chosen case law, this does not serve as sufficient notice. Indeed, in *Pelfrey* we found the pleading at issue provided sufficient notice of the fact that the defendants were being sued in their individual capacity in part because it "stated that the defendants acted *outside* the scope of their employment." *Pelfrey*, 43 F.3d at 1038 (emphasis added).

Paragraph 8 sets forth the §1983 claim. Paragraph 8 states (and it states nothing else) the following: "The actions of the said officers constituted the deprivation of the plaintiff's rights under color of state law prohibited by 42 U.S.C. 1983." Complaint, ¶ 8. Under *Wells*, it must be assumed that in the §1983 claim the defendants are being sued in their

official capacity only.

The majority also relies on the allegation in Paragraph 11 that: "The said officers, acting *for themselves and* for the City," behaved "with malice . . . and violated the plaintiff's civil rights." *Ante*, at 7 (quoting the Complaint, emphasis added by majority). However, this allegation, fairly read, does not clearly set forth that the §1983 claim is against the officers in their individual capacities. The full text of that paragraph provides:

> The said officers, acting for themselves and for the City, instituted all of the criminal charges against the plaintiff without probable cause and with malice. The charges were not instituted for the proper purpose of bringing the plaintiff to justice, but to shield and cover up the wrongful actions of the said defendants as described above. The said criminal prosecutions for contributing to the delinquency of a minor and aggravated assault have already been terminated in favor of the plaintiff, with the said charges being dismissed at the preliminary hearing. The placing of said charges of contributing to the delinquency of a minor and aggravated assault constitute the torts of malicious prosecution and the abuse of process, and violated the plaintiff's civil rights enumerated above.

Complaint, §11. When viewed in full, it is apparent that Paragraph 11 sets forth state law claims of "the torts of malicious prosecution and abuse of process," and tacks on a

reference to previously asserted civil rights, as stated in paragraphs 7 and 8.[15] I simply do not see how such a vague reference puts the defendants on notice that both the §1983 claims and the state law claims were individual capacity suits, especially when the separate paragraph devoted to the §1983 cause of action makes no mention of individual capacity. Furthermore, when read against the backdrop of paragraphs 1 and 15, which state that *all* of the actions of the officers were performed under color of law and in furtherance of the business of the City, we are left with a hopeless ambiguity, clearly insufficient to alert the defendants that they were being sued in their individual capacities under federal law.

Lastly, the majority relies on the prayer for relief,

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[15] Paragraph 7 provides:

> The said officers used excessive and unreasonable force in arresting the plaintiff, and their actions, including both the arrest and the use of force during the arrest, violated the plaintiff's rights, privileges and immunities secured by the United States Constitution, including the right to be free of an unreasonable seizure and to be free of a deprivation of liberty under the 4th and 14th Amendments to the Constitution of the United States as well as his right to free speech under the First Amendment.

The said actions also violated the plaintiff's rights secured by Article 1, §§7 and 8 of the Tennessee Constitution.

Complaint, ¶ 7.

wherein Plaintiff makes blanket requests for both compensatory and punitive damages "against *each* of the defendants." *Id.* (emphasis added). However, given the mixed nature of the claims against the various defendants, i.e., both federal and state law claims, a comprehensive prayer for relief that might be construed as *implying* personal liability cannot be called clear notice.

In sum, the Complaint utterly fails to allege individual capacity claims. Thus, under a traditional application of *Wells*, it must be assumed that the defendants were sued in their official capacities only, because the Complaint fails to allege that the defendants were sued in their personal capacities. The district court therefore did not err in dismissing the defendants in their individual capacities.

The "course of proceedings" does not demonstrate that notice of individual capacity claims was "given and received" either. As the majority indicates, the nature of any defenses raised in response to the complaint is a relevant factor. See *Biggs*, 66 F.3d at 61. Here, the individual Defendants did not respond in a way that reflects any perception on their part of potential individual liability. Indeed, the officers did not file individual answers, and thus, obviously, never asserted the affirmative defense of qualified immunity. *See id.* (observing that assertion of qualified immunity defense indicates that the defendant interpreted the plaintiff's action as being against him personally because qualified immunity is only available in a personal capacity suit).

Rather, only one Answer was filed: by the City. The City's Answer also reflects the City's perception that this was an official capacity suit. The first sentence of the City's

Answer states: "The Defendant City of Harriman and its employees do hereby appear and answer this Complaint as follows." Further, the Answer also provides that, "it is maintained that neither the City of Harriman nor its employees did any act which would render the City of Harriman responsible to the plaintiff for damages in this case." Answer, ¶ 21. It also states, "it is hereby specifically maintained that the plaintiff is not entitled to recover punitive damages against a governmental entity such as the City of Harriman and therefore such claim for punitive damages fails to state a claim upon which relief can be granted." *Id.*, ¶ 23. This Answer, coupled with the fact that not one of the officers filed a separate answer, should have put Plaintiff on notice that the officers did not regard the suit as one against them personally. These circumstances should have prompted Plaintiff to seek leave to amend his Complaint to clarify his claims, or to seek a default judgment. Plaintiff did neither.

A telling indication that Defendants did not interpret Plaintiff's action as a personal capacity suit is their joint motion to dismiss, filed by the City's attorneys on January 22, 1998. In it, they expressly state that "the foregoing Defendants should be dismissed for failure of the Plaintiffs' to state a claim against them in their individual capacity." Pursuant to the district court's scheduling order, Plaintiff had until February 9, 1998, to amend the pleadings. Plaintiff responded to the motion on February 11, 1998, but did not seek leave to amend to insert an allegation that the officers were being sued in their individual capacities until March 6, 1998, after the order granting Defendants' motion was entered on February 27, 1998. Thus, even in the face of clear notice from Defendants that notice of individual capacity had not been "received," Plaintiff did not do anything until almost

the eve of trial, which had been set for May 20, 1998, which, by the way, was thirteen months after the complaint had been filed. *Cf. Pelfrey*, 43 F.3d at 1038 (although the complaint failed to indicate capacity, the plaintiff filed a motion one month after the complaint was filed clarifying that the defendants were being sued in their personal capacities). Thus, the matter before us did not come to us in the posture of "still in a relatively early stage of litigation." *Ante* at 6 n.1.

Thus, even after sifting through the course of proceedings, we come up with little evidence to establish that Plaintiff gave clear notice of his intent to sue Defendants in their personal capacities and that Defendants received this notice. In other words, it simply cannot be said that Plaintiff's intention to hold Defendants personally liable could be "fairly ascertained." *See Biggs*, 66 F.3d at 61 (noting that throughout the course of proceedings, "the underlying inquiry remains whether the plaintiff's intention to hold a defendant personally liable can be ascertained fairly"). The majority's holding is contrary to *Wells* and progeny, does not fit within the narrow exception created by *Pelfrey*, and does not even pass muster under a course of proceedings analysis.

IV.

The majority also finds that the district court erred in refusing to allow Plaintiff to amend his complaint. The majority acknowledges that the one-year statute of limitations for Plaintiff's §1983 claim had run, but holds that the court failed to properly apply Federal Rule of Civil Procedure 15(c). Rule 15(c)(2) allows amendments to relate back when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or

attempted to be set forth in the original pleading." Rule 15(c)(3) allows changes to a party or "the naming of a party" if the provisions of 15(c)(2) are met and within the 120 days from the filing of the original complaint, the party to be brought in "has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits," and "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed. R. Civ. P. 15(c)(3).

I do not see how the second and third requirements of 15(c)(3) are met here. First, Defendants would be prejudiced in preparing a defense on the merits. Had they known they were being sued personally, they might have developed a different legal strategy, such as "retained independent counsel or participated more fully in the defense." *Lovelace*, 985 F.2d at 850. Furthermore, Plaintiff did not move to amend until little over a month before trial, thirteen months after the Complaint had been filed (which was much longer than in *Lovelace*, which was only several months after the 120 days allowed for service of the summons and complaint time frame), and presumably long after discovery had closed. As previously noted, none of the individual Defendants in this case filed an answer, pled the affirmative defense of qualified immunity, or engaged in discovery. Under the majority's view, they nonetheless would have had to stand ready for trial within a month. The prejudice is obvious.

For all the reasons discussed at length in this dissent, there is nothing in the record to indicate that defendants knew or should have known the §1983 suit would have been brought against them personally *because Plaintiff failed to*

give clear notice, even though it was incumbent on Plaintiff to do so. I do not see how the state tort claims provided clear notice of personal capacity under §1983, which bear no relation to the unique pleading requirements of §1983. In essence, Defendants have been punished for failing to assume that they were liable in their personal capacities. This is not the law of this Circuit, and the majority has not taken such a drastic step.

Furthermore, in my view, *Brown v. Shaner*, 172 F.3d 927 (6th Cir.), *cert. denied*, 528 U.S. 966, 145 L. Ed. 2d 314, 120 S. Ct. 403 (1999), is inconsistent with *Lovelace*, and more fundamentally, inconsistent with Fed. R. Civ. P. 15(c)(3). In *Brown*, this Court held that a second amended complaint in a §1983 action, explicitly naming defendant police officers in their individual capacities, related back to the date of the original pleading, which did not specify capacity. The *Brown* court held that *Lovelace* was not controlling.

> *Lovelace* does not control this case. First, the Court did not consider the complaint independently under (c)(2), but seems to have assumed without comment that (c)(2) was inapplicable in this case as a basis for relation back. The Court's silence regarding availability of (c)(2) leaves open for this Court to decide whether (c)(2) affords an independent basis for relation back. Second, even if we were to focus on (c)(3), *Lovelace* is distinguishable because it was not "apparent" in *Lovelace* that [the defendant] knew or should have known of a "mistake" in the

identify of the party set forth in the pleadings.

Brown, 172 F.3d at 933. We explained that the original complaint in *Lovelace* clearly stated that the defendant "had not acted as an individual," but within the "powers of his official capacity." *Id.* By contrast, the complaint in *Brown* did not state the capacity in which the individual defendants were being sued. *Id.* Finally, the defendants' counsel in *Brown* *"acknowledged at oral argument that it was clear from a reading of the complaint that these defendants could not be held liable in their official capacity."* *Id.* (emphasis in original).

Brown's attempt to distinguish *Lovelace* on the grounds that *Lovelace* did not consider the complaint independently under Fed. R. Civ. P. 15(c)(2) is inconsistent with the Rule. The *Lovelace* case did not consider Rule 15(c)(2) because (c)(2) applies when the amendment seeks to add a claim or defense. Rule 15(c)(3) applies when the amendment changes the party or the naming of the party. In altering capacity, one is changing the party, not the claim. *See* Fed. R. Civ. P. 9(a). In any event, the majority acknowledges that "we have not answered whether Rule 15(c)(2) applies when a §1983 plaintiff seeks to alter the capacity in which a defendant has been sued, although we have held this type of alteration acceptable under Rule 15(c)(3)." *Ante*, *supra*, at 8. Apparently, the majority thinks that this aspect of *Brown* is dicta. I will too. In any event, the prejudice prong was not met in *Brown*, given counsel's concession at oral argument.

In sum, I would affirm the district court's denial of Plaintiff's motion to amend as a proper application of Fed. R. Civ. P. 15 and *Lovelace*.

V.

Although we review appeals in civil rights cases raising issues such as this one with special care, we should not grant special, less demanding pleading requirements to civil rights plaintiffs. We take special care with *pro se* litigants, too. *Wells*, 891 F.2d at 594 (citing *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)). But we still require them to alert government defendants that they may be held individually liable for damages, and to conform to basic pleading requirements. *Id.* The standard should be no different for represented civil rights plaintiffs, as here. They too must provide government defendants fair notice of the capacity in which they are sued, and the only fair notice is clear notice by the face of the complaint. *Id.*

The majority's ruling today flouts well-established precedent, and ignores the underlying jurisdictional, prudential, and public policy concerns that gave rise to the *Wells* rule. Furthermore, even under the majority's newly-crafted test, clear notice of capacity - at any stage in the proceedings - was lacking here. The district court also correctly denied Plaintiff's eleventh-hour motion to amend. The district court's dismissal of Moore's complaint should be affirmed.

APPENDIX

In the United States District Court
for the Eastern District of Tennessee

No. 3:97-CV-243

Ralph Moore, Jr.
521 Sheldon Rd.
Harriman, TN 37748
Plaintiff

vs.

City of Harriman, Tennessee,
Harriman Police Department,
Roy Jenkins, Chief of Police,
Darren McBroom, Terry Fink,
Randy Heidle, Virgil McCart,
and Jerry Singleton, Harriman
Police Department
302 Roane St.,
Harriman, TN 37748,
Defendants

Complaint

Now comes the plaintiff and shows unto the Court as follows:

1. **Parties**. The parties are identified as follows:

a. The plaintiff is a citizen and resident of the Eastern Distirict of Tennessee, with address as stated in the caption.

b. The defendant is a Tennessee municipal corporation located in the Eastern District of Tennessee.

c. The defendant Jenkins was at all times relevant to this action the Chief of the City of Harriman Police Department and as such was responsible for hiring, training, supervision and/or control of the officers in the Harriman Police Department. The other individual defendants were at all times relevant to this action officers of the City of Harriman Police Department and were acting in the course of their employment and in furtherance of the business of the City. At all times relevant hereto the said defendants were acting under color of Tennessee law, and in the Eastern District of Tennessee.

2. **Jurisdiction**. This action is brought pursuant to 42 U.S.C. §§1983 and the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, with jurisdiction founded on 28 U.S.C. 1331 "Federal question" and 28 U.S.C. 1343, "Civil rights and elective franchise."

Jurisdiction of the state law claims made herein is founded on 28 U.S.C. 1367, Supplemental jurisdiction."

3. **Venue**. Venue is based upon 28 U.S.C. 1391, by virtue of the facts that a substantial part of the evening giving rise to the cause of action occurred within this district.

4. On or about the morning of April 7, 1996, the defendants McBroom, Fink, Heidle, McCart, and Singleton,

all City of Harriman police officers, went to the plaintiff's residence at 521 Sheldon Rd., Harriman, TN, in four separate police cruisers, supposedly to investigate a report that shots had been fired in the neighborhood. Shortly thereafter the plaintiff also arrived at the house driving his own vehicle, with his wife Linda Moore and Crystal Pressley, age 17, as passengers. Upon arriving at the house, the plaintiff found all of the officers in his yard, with two of the officers being on his porch and/or at his door. Upon ascertaining the reason the officers claims to be on his property, the plaintiff exercised hir right of free speech and asked them to leave. The officers refused to leave, and the plaintiff repeated his request several more times. At that point, the defendant officer McBroom told the plaintiff that if he didn't calm down he would be arrested for disorderly conduct. Upon hearing that, the plaintiff advised the officers that he was going to go see the mayor about the matter, and he got back into his vehicle. At that point, the plaintiff was not under arrest, and had not violated any law of the State of Tennessee or the United States of America. And, at that time, the said officers did not have probable cause to arrest the plaintiff or to believe that he had committed any offense, not did they have legal grounds to confine him or restrict his movements in any way.

The said officers proceeded to pull the plaintiff's car door open and the defendant Fink sprayed the plaintiff in the face with Mace, and proceeded to drag him out of the car by the left arm. Thereupon, the said officers administered a vicious beating, including additional mace attacks and striking the plaintiff in the head with hard objects. From these events the plaintiff sustained numerous injuries including a permanent impairment of his left arm and permanent injury to his eyes.

All of these events took place in the front yard of the plaintiff's house in Harriman, Tennessee.

5. Following the beating, the officers threw the plaintiff head-first into a police cruiser and took him to the Harriman City Hospital. On the way to the hospital the plaintiff began having seizures. The plaintiff remained in the Harriman City Hospital for one and one-half days, being administered oxygen and monitored by a heart monitor.

6. Upon the plaintiff's release from the hospital, the said officers placed criminal charges against the plaintiff as follows:

Disorderly conduct
Aggravated assault on a police officer
Simple asault on a police officer
Resisting arrest
Contributing to the delinquency of a minor

At the preliminary hearing, the court dismissed the charges of contributing to the delinquency of a minor, and the court reduced the charge of aggravated assault to simple assault because of lack of probable cause of any aggravated assault.

7. The said officers used excessive and unreasonable force in arresting the plaintiff, and their actions, including both the arrest and the use of force during the arrest, violated the plaintiff's rights, privileges and immunities secured by the United States Constitution, including the right to be free of an unreasonable seizure and to be free of a deprivation of liberty under the 4th and 14th Amendments to the Constitution of the

United States as well as his right to free speech under the First Amendment.

The said actions also violated the plaintiff's rights secured by Article 1, §§7 and 8 of the Tennessee Constitution.

8. The action of the said officers constituted the deprivation of the plaintiff's rights under color of state law prohibited by 42 U.S.C. 1983.

9. The said officers retaliated against the plaintiff for the exercise of his right of free speech with excessive and unreasonable force including the spraying of mace.

10. At no time did the said officers have probable cause to arrest the plaintiff or to believe that he had committed any offense, nor did they have legal grounds to confine him or restrict his movements in any way.

11. The said officers, acting for themselves and for the City, instituted all of the criminal charges against the plaintiff without probable cause and with malice. The charges were instituted not for the primary purpose of bringing the plaintiff to justice, but to shield and cover up the wrongful actions of the said defendants as described above. The said criminal proceedings for contributing to the delinquency of a minor and aggravated assault have already been terminated in favor of the plaintiff, with the said charges being dismissed at the preliminary hearing. The placing of the said charges of contributing to the delinquency of a minor and aggravated assault constitute the torts of malicious prosecution and abuse of process, and violated the plaintiff's civil rights enumerated

above.

12. As set out herein, the plaintiff was assaulted, battered and subjected to excessive force by the said officers, including being sprayed in the eyes with mace, and was subjected to a false arrest and imprisonment. The said officers' actions were without cause or justification. At no time did the plaintiff violate any law of Tennessee or of the United States.

13. As the proximate result of the said officers' acts and omissions described herein the plaintiff has suffered injuries and damages including permanent loss of the use of his left arm, injury to his eyes, loss of employability, medical and legal expenses, pain and suffering, loss of his personal liberty, loss of reputation, being prevented from attending to his personal affairs and business, mental trauma and anguish.

14. The actions of the said officers were accomplished in concert and in conspiracy with one another.

15. At all times relevant to this action, the said officers were employees and/or agents of the City of Harriman. All of the said officers were taken in the course of and in the scope of their employment by the City, for which the City and the defendant police chief Jenkins are liable victoriously, according to the principles of respondeat superior.

16. The City and the defendant police chief Jenkins were negligent and recklessly negligent in the hiring, training, supervision and/or control of the individual defendants, and, in particular, in the training and supervision in the use of

mace, and in issuing mace without proper training and supervision. Consequently, the City and the defendant police chief Jenkins have violated the plaintiff's rights, privileges and immunities secured by the United States Constitution, including the right to be free of an unreasonable seizure and to be free of a deprivation of liberty under the 4th and 14th Amendments to the Constitution of the United States as well as his right to free speech under the First Amendment. The actions of the said officers constituted the deprivation of the plaintiff's rights under color of state law prohibited by 42 U.S.C. 1983.

The said actions also violated the plaintiff's rights secured by Article 1, §§7 and 8 of the Tennessee Constitution.

The City and the defendant police chief Jenkins are directly liable for the injuries of the plaintiff separate and apart from their liability under the principles of respondeat superior.

17. The said actions of the defendants were accomplished intentionally, recklessly, maliciously and/or fraudulently.

Wherefore, the plaintiff requests that the Court:

a. Award compensatory damages against each of the defendants in such amount as shall be proved at the trial of this cause.

b. Award punitive damages against each of the defendants in such amount as shall be proved at the trial of

this cause.

c. Award costs of this action including attorneys fees.

d. Award such other further and general relief as this Court may deem appropriate.

THE PLAINTIFF DEMANDS A TRIAL BY JURY.

/s/_____
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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 99-5258

[Filed September 12, 2000]

RALPH MOORE, JR., *Plaintiff-Appellant*,
v.
CITY OF HARRIMAN, ET AL., *Defendant-Appellees*.

JUDGES:

BEFORE: MARTIN, Chief Judge; MERRITT, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

"The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

It is FURTHER ORDERED that the appellant file a supplement brief not later than Tuesday, October 10, 2000 and the appellees file a supplemental brief not later than Tuesday, November 7, 2000.

The clerk will schedule this case for oral argument as directed by the court.

APPENDIX C

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

NO. 99-5258

[Filed July 6, 2000]

Ralph Moore, Jr.,
Plaintiff-Appellant,

v.

City of Harriman; Harriman Police Department; Roy Jenkins, Chief of Police; Darren McBroom; Terry Fink; Randy Heidle; Virgil McCart; and Jerry Singleton
Defendants-Appellees.

Before: NELSON, COLE, and CLAY, Circuit Judges

OPINION

CLAY, Circuit Judge.

Plaintiff, Ralph Moore, Jr., appeals from the district court's order dismissing Plaintiff's claims against Defendants, various police officers with the City of Harriman ("the Officers"), on the basis that Plaintiff did not sue the Officers in their individual capacities and that, as such, any claim asserted against them should be dismissed for failure to state a claim. For the reasons set forth below, we **REVERSE** the district court's order.

BACKGROUND

Plaintiff filed suit under 42 U.S.C. §1983 against the Officers on April 7, 1997, for allegedly using excessive force to effectuate Plaintiff's April 7, 1996 arrest in violation of Plaintiff's Fourth Amendment rights. Plaintiff also alleged various pendent state law claims in his complaint. In the caption of his complaint, Plaintiff named as defendants " City of Harriman, Tennessee; Harriman Police Department; Roy Jenkins, Chief of Police[1]; Darren McBroom; Terry Fink; Randy Heidle; Virgil McCart; and Jerry Singleton." All of the parties named as defendants in the caption of Plaintiff's complaint filed a joint answer on May 14, 1997. The caption of the answer lists the City of Harriman, the police department, and the Officers in three separate groups.

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[1] Roy Jenkins passed away on February 28, 1998, and his estate was not substituted as a party.

The Officers filed a motion to dismiss for failure to state a claim on January 22, 1998, on the basis that Plaintiff did not expressly state that the Officers were being sued in their individual capacities. On February 27, 1998, the district court granted the Officers' motion and dismissed any claims against them in their individual capacities without prejudice.

Plaintiff moved to alter or amend his complaint to specifically allege that the Officers were being sued in their individual capacities under §1983, and to alter or amend the February 27, 1998, order to reflect that the state law causes of action against the Officers individually had not been dismissed. On April 15, 1998, the Court denied Plaintiff's motion to amend the complaint as to Plaintiff's §1983 claims on the basis that it would be futile to do so because the claims would be barred by the statute of limitations.[2] The court reasoned that Plaintiff could not amend his complaint regarding the federal claims because "it is too late to notify the individual defendants that they may be individually liable for the federal civil rights action brought against them and the amended complaint could not relate back under Rule 15(c)" of the Federal Rules of Civil Procedure. Nonetheless, the court permitted Plaintiff's state claims against the Officers in their individual capacities to continue, finding that the

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[2] The Supreme Court has held that all actions brought under §1983 shall be subject to a state's statute of limitations governing actions for personal injuries. *See Wilson v. Garcia*, 471 U.S. 261, 268-79, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985). The State of Tennessee's statute of limitations for personal injury actions is one year. *See Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). Plaintiff's claim arose from an incident which occurred in April of 1996.

pleading requirements for state torts were not as "stringent" as the requirements for a §1983 individual capacity claim. Accordingly, the case proceeded against the City of Harriman, but against the Officers individually only in regard to Plaintiff's state law claims.

The City of Harriman moved for summary judgment, which the district court granted on August 4, 1998; Plaintiff is not appealing that decision. All of the federal claims having been dismissed, the Officers moved to dismiss the remaining state law claims, and the district court granted the Officers' motion without prejudice on February 10, 1999. Plaintiff filed a notice of appeal on February 22, 1999, challenging the district court's decision to dismiss any §1983 claims Plaintiff attempted to assert against the Officers in their individual capacities, as well as the district court's decision to deny Plaintiff an opportunity to amend his complaint to more specifically allege Plaintiff's §1983 claims against the Officers in their individual capacities.

DISCUSSION

Plaintiff argues that the district court erred in dismissing his complaint for failure to state a claim on the basis that Plaintiff did not sue the Officers in their individual capacities. We review *de novo* a district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Turker v. Ohio Dep't of Rehabilitation and Corrections*, 157 F.3d 453, 456 (6th Cir. 1998). We must construe the complaint in the light most favorable to Plaintiff, accept his factual allegations as true, and determine whether he can prove any set of facts in support of his claim that would entitle him to relief. *Id.*

In *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989), this Court held that it will assume that a government official is being sued in his official capacity unless the plaintiff "properly allege[s] capacity in [his] complaint." The rationale behind the specificity rule was to afford state officials sufficient notice that they may be held personally liable for any damage award.[3] *Id.* The Court also held that the requirement applied to *pro se* plaintiffs, noting that "[i]t is certainly reasonable to ask that all plaintiffs, even *pro se* plaintiffs, some of whom file several appeals each year with us, [to] alert party defendants that they may be individually responsible in damages." *Id.*

However, in *Pelfrey v. Chambers*, 43 F.3d 1034, 1038 (6th Cir. 1995), this Court held that although the *pro se* plaintiff's complaint failed to specify that he was suing the state officers in their individual capacities, the plaintiff could proceed with his individual claims because the state officials "were given sufficient notice of the fact that they were being sued in their individual capacity." In reaching this conclusion, the Court relied upon a motion filed by the plaintiff one month after the complaint was filed, which asked that the Ohio Attorney General be barred from representing

---

[3] In addition to the necessity of providing notice to the defendants, the *Wells* court also based its holding – that a suit against state officials in a §1983 action must make clear the defendants are being sued in their individual capacities – on the Eleventh Amendment bar to suits against a state in federal court. *See Wells v. Brown*, 891 F.2d 591, 592-93 (6th Cir. 1989). Because the Officers are municipal employees and a §1983 suit against a municipality is not barred by the Eleventh Amendment, the Eleventh Amendment is not at issue.

the defendants and "specifically stated that the defendants acted outside the scope of their employment and in bad faith when they cut his hair." *Id.* Similarly, in *Abdur-Rahman v. Michigan Dep't of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995), this Court found that although the plaintiff's complaint failed to specify the capacity in which the defendant was being sued, the plaintiff's reply to the motion for summary judgment made it clear that the plaintiff intended to sue the defendant in his individual capacity. The Court therefore concluded that the plaintiff had provided sufficient notice to the defendant that he was being sued in his individual capacity. Likewise, in *Perry v. Croucher*, No. 97-3033, 1998 WL 661151, at *7-*8 (6th Cir. Aug. 31, 1998), this Court found that where the complaint repeatedly specified the defendants acted "in bad faith" and "willfully, maliciously, and with reckless indifference to and in disregard of [the] plaintiff's rights"; and where the defendants moved for dismissal on the basis of immunity, the defendants had sufficient notice that they were being sued individually. *Id.* The Court found "significant" that the defendants raised the immunity defense because "such immunity is extended to officials only in their personal capacities" thereby indicating that the defendants had an understanding that they were being sued in their personal capacities. *Id.*

Based upon the state of the law in this circuit as outlined above, the district court erred in granting the Officers' 12(b)(6) motion to dismiss, where the complaint provided the Officers sufficient notice that they were being sued in their individual capacities. Although it is true that the caption to Plaintiff's complaint does not specify that the Officers were being sued in their individual capacities, and that ambiguity does exist throughout the complaint as to the

capacity in which the Officers are being sued, the complaint taken as a whole provides sufficient notice to the Officers that they were being sued individually. *See Wells*, 891 F.2d at 593 (noting that while no particular language is necessary, the complaint must put the individual defendant on notice of the claims against which he must defend).

For example, what is most telling are the allegations set forth in paragraph eleven of the complaint, which state in relevant part that :

> The said officers, *acting for themselves and for the City*, instituted all of the criminal charges against the plaintiff without probable cause and with *malice*. The charges were instituted not for the primary purpose of bringing the plaintiff to justice, but to shield and cover up the wrongful actions of the said defendants as described above. The said criminal proceedings for contributing to the delinquency of a minor and aggravated assault have already been terminated in favor of the plaintiff, with the said charges being dismissed at the preliminary hearing. The placing of the said charges of contributing to the delinquency of a minor and aggravated assault constitute the *torts of malicious prosecution and abuse of process, and violated the plaintiff's civil rights enumerated above.*

(J.A. at 11-12 (emphasis added)). As in *Pelfrey*, where this Court found that the plaintiff's allegations that "the defendants acted outside the scope of their employment and in bad faith"

provided sufficient notice to the defendants that they were being sued individually, *see* 43 F.3d at 1038, Plaintiff's allegations that the Officers "act[ed] for themselves and ... with malice, "and also engaged in intentional torts, provided sufficient notice to the Officers that they were being sued in their individual capacities. The same can be said when taking into account that the *Perry* court considered the plaintiff's specific allegations that the defendants acted "in bad faith" and acted "willfully, maliciously, and with reckless indifference to and in disregard of [the plaintiff's rights]", when it held that the defendants were provided sufficient notice regarding individual liability. *See* 1998 WL 661151, at *7-*8. As noted, Plaintiff in the instant case makes similar allegations which should be construed as providing notice to the Officers. *See id*; *see also Soper v. Hoben*, 195 F.3d 845, 856 (6th Cir. 1999) (Moore, J., concurring in part and dissenting in part) (finding that the §1983 plaintiff's allegations of "'reckless, wilful, wanton, malicious and/or intentional'" conduct on the part of the defendants were sufficient to provide notice to the defendants that they were being sued in their individual capacities)

We are not persuaded otherwise by the Officer's reliance on *Gongolewski v. Lexington-Fayette Urban County Government*, No. 89-6470, 1990 WL 200378 (6th Cir. Dec.12, 1990) (unpublished *per curiam*). Of course, as an unpublished opinion, *Gongolewski* is not binding. *See United States v. Williams*, 15 F.3d 1356, 1362 n.6 (6th Cir. 1994) (*en banc*). That aside, *Gongolewski* is distinguishable and therefore is of no significance to the Officers' contention. Although the *Gongolewski* court held that the plaintiff's failure to name the §1983 defendants in their individual capacities was fatal to the claims, the plaintiff in *Gongolewski*

failed to make a single reference to the defendants being sued in their individual capacities, and instead specifically addressed the defendants in their official capacities throughout the body of the complaint. *See id.* at *2. In addition, unlike Plaintiff in the case at hand, the plaintiff in *Gongolewski* did not make reference to any acts by the defendants which were done with malice or intent. *See id.* These critical facts which inure to Plaintiff's benefit here were absent from the plaintiff's complaint in *Gongolewski*.

Finally, and important factor in this case is that the state claims brought against the Officers in their individual capacities were not dismissed. That is to say, Plaintiff brought claims in relation to the Officers' actions under Article 1, Sections 7 and 8 of the Tennessee Constitution, and the Officers would have been required to defend against these state law claims had the district court not granted the City's motion for summary judgment and dismissed Plaintiff's state law claims without prejudice. Article 1, Section 7 of the Tennessee Constitution regarding unreasonable searches and seizures is the state analog to the Fourth Amendment of the United States Constitution.[4] *See* Tenn. Const. art. I, §7.

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[4] Article 1, Section 7 of the Tennesse Constitution provides:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly

Furthermore, Article I, Section 8 of the Tennessee Constitution provides that "no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." *See* Tenn. Const. art I, §8. Because the Officers would be required to defend themselves individually regarding the state law tort claims brought under these amendments - which included assault and battery, malicious prosecution, abuse of process, false arrest and false imprisonment - it is reasonable to conclude that the Officers believed that they were on notice that they were being sued in their individual capacities regarding the analogous §1983 claims. *See Wells*, 891 F.2d at 593. Moreover, under these facts, the Officers would not be prejudiced by having to defend against the federal claims. *See Soper*, 195 F.3d at 856 (Moore, J., concurring in part and dissenting in part).

In an attempt to rebut the above, the Officers rely upon *Childs v. Koosed*, No. 90-3449, 1991 WL 33133, at **2 (6th Cir. Mar.13, 1991) (unpublished *per curiam*), where this Court found that the plaintiff's filing suit against the defendants individually on state law claims for breach of contract was insufficient to properly notice the defendants that they were being sued in their individual capacities regarding the plaintiff's §1983 claims. The *Childs* court noted that while the plaintiff had sued the defendants "in their individual

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> described and supported by evidence, are dangerous to liberty and ought not be granted.

Tenn. Const. art. I §7.

and administrative capacities" regarding the state claim for breach of contract, "no mention of individual capacity is made in the federal counts, and defendants are referred to by their official capacities throughout the complaint." *Id.* As such, the *Childs* court concluded that the defendants were not provided proper notice of the need to defend against the §1983 claims. *Id.*

We find *Childs*, again an unpublished decision which is not binding, to be unpersuasive and distinguishable from the case at hand. Unlike *Childs*, Plaintiff in this case made state law claims which would require the same type of defense for the federal claims, and Plaintiff made references within the complaint which would giver rise to a conclusion that the Officers were being sued in their individual capacities. Accordingly, the factors which the *Childs* court found significant in determining that the plaintiff had not noticed the defendants that they were being sued in their individual capacities are not present here, and the Officers would not be prejudiced by having to defend the analogous federal claims. *Compare Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993) (finding that because the complaint contained a statement that the defendant was acting "not as an individual" but "clearly within the expressed and implied powers of his official capacity," the defendant "had no reason to believe that he would be held personally liable or that his personal assets were at a stake").

Accordingly, we hold that the district court erred in granting the Officers' 12(b)(6) motion to dismiss any claims in their individual capacities, where Plaintiff made references in his complaint as to the Officers acting "for themselves" and as well as in their official capacities; where Plaintiff made

reference to the Officers acting with malice; and where the Officers were required to defend themselves individually against the analogous state law tort claims, thereby providing the Officers notice to defend on the federal §1983 claims.

Having found that the district court erred in dismissing Plaintiff's §1983 complaint against the Officers in their individual capacities, we need not consider Plaintiff's alternative argument that the district court abused its discretion in denying Plaintiff's motion to amend his complaint.

CONCLUSION

For the above stated reasons, we **REVERSE**, the district court's order granting the Officers' 12(b)(6) motion to dismiss the §1983 claims brought against the Officers in their individual capacities, and **REMAND** the case for trial.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:97-cv-243

Ralph Moore, Jr.,	)
Plaintiff	)
	)
v.	)
	)
City of Harriman, Tennessee,	)
Harriman Police Department,	)
Roy Jenkins, Chief of Police,	)
Darren McBroom, Terry Fink,	)
Randy Heidle, Virgil McCart,	)
and Jerry Singleton	)
Defendants	)
	)

MEMORANDUM OPINION

This is a §1983 action alleging false arrest and the use of excessive force on the part of the City of Harriman through its chief of police and five other officers. Currently pending is the motion to dismiss of the individual defendants claiming that the complaint fails to sufficiently allege that any of the defendants are being sued in their individual capacities [Court

File #13]. *See Wells v. Brown*, 891 F.2d 591, 592-93 (6th Cir. 1989). For the reasons that follow, the motion will be granted and the individual defendants, in their capacities, will be dismissed.

> Plaintiff identified the defendants in the style of his complaint as follows:
>
> City of Harriman, Tennessee, Harriman Police Department, Roy Jenkins, Chief of Police, Darren McBroom, Terry Fink, Randy Heidle, Virgil McCart, and Jerry Singleton
>
> Harriman Police Department
> 302 Roane St.
> Harriman, TN 37748

Plaintiff alleges in ¶ 1.c. that defendant Roy Jenkins "was at all times relevant to this action the Chief of the City of Harriman Police Department and as such was responsible for hiring, training, supervision, and/or control of the officers in the Harriman Police Department." The same paragraph goes on to claim that the "other individual defendants were at all times relevant to this action officers of the City of Harriman Police Department and were acting in the course of their employment and in furtherance of the business of the city."

Paragraph 4 of the complaint alleges that on the morning of April 7, 1996, defendants McBroom, Fink, Heidle, McCart, and Singleton, all City of Harriman police officers; went tot he plaintiff's residence in four separate police cruisers supposedly to investigate a report that shots had been fired in the neighborhood. Shortly thereafter,

plaintiff arrived driving his own vehicle and found one of the officers in his yard, with two of them being on his porch and/or at his door. After ascertaining the reason the officers claimed to be on his property, plaintiff claims he exercised his right of free speech and asked them to leave. The officers refused to leave and plaintiff repeated his request several more times. At that point, defendant Officer McBroom allegedly told the plaintiff that if he did not calm down he would be arrested for disorderly conduct. Plaintiff then told them that he was going to go see the mayor about the matter and got back into his vehicel.

Plaintiff claims that the officers then proceeded to pull plaintiff's car door open and defendant Fink sprayed the plaintiff in the face with mace and dragged him out of the car by the left arm. Thereupon, plaintiff contends that the officers administered a vicious beating to him, including additional mace attacks and striking plaintiff in the head with hard objects, causing him to suffer a number of serious and permanent injuries.

Plaintiff was taken to the Harriman City Hospital and on the way began having seizures. He remained in the hospital for a day and a half and, upon his release, the officers charged plaintiff with disorderly conduct, aggravated assault on a police officer, simple assault on a police officer, resisting arrest and contributing to the delinquency of a minor.

Paragraph 7 of the complaint alleges that the officers used excessive and unreasonable force in arresting him, thereby violating the Fourth and Fourteenth Amendments to the United States Constitution, as well as his right to free

speech under the First Amendment.

Paragraph 11 of the complaint states that, "The said officers, acting for themselves and for the City, instituted all of the criminal charges against the plaintiff without probable cause and with malice." Paragraph 14 alleges that the actions of the officers "were accomplished in concert and in conspiracy with one another." Paragraph 15 states as follows:

> At all times relevant to this action, the said officers were employees and/or agents of the City of Harriman. All of the said actions of the said officers were taken in the course of and in the scope of their employment by the City, for which the City and the police chief Jenkins are liable vicariously, according to the principles of *respondeat superior*

Paragraph 16 of the complaint alleges in part that, "The City and the defendant police chief Jenkins are directly liable for the injuries to the plaintiff separate and apart from their liability under the principles of *respondeat superior*." The complaint seeks compensatory and punitive damages against "each of the defendants."

The individual defendants contend that the complaint only stated a claim against them in their official capacities and was not sufficiently clear to give them notice that they were being sued in their individual capacities. The distinction between an official capacity and an individual capacity suit is significant. A claim against the defendants in their official capacities is treated as an action against the City of Harriman only and they would not be personally liable for any damages.

However, a suit against them in their individual capacities could render them personally liable for damages. Accordingly, the United States Court of Appeals for the Sixth Circuit has adopted the following rule:

> ... We adopt the Eighth Circuit's interpretation of *Will*, which requires that plaintiffs seeking damages under §1983 set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials.

See Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989). The court in *Wells* also cited the following language from the Eight Circuit:

> As the Eighth Circuit has stated, the face of a complaint must indicated whether a plaintiff seeks to recover damages from defendants directly, or to hold the state responsible for the conduct of its employees.

Id., *citing Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989) (individual capacity suits must be clear enough to notify defendant of the personal nature of the suit). Although modern pleading is less rigid than in an earlier day, *see Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957), we have not let down all pleading barriers. It is not too much to ask that if a person or entity is to be subject to suit, the person or entity should be properly named and clearly notified of the potential payment of damages individually. *Brandon v. Holz*, 469 U.S. 464, 474,

105 S.Ct 873, 879, 83 L.Ed.2d 878 (1985) (Burger, C.J., concurring in the judgment). The Eighth Circuit in *Nix* noted that litigants wishing to sue government agents in both their individual and official capacities should simply use the following language: "Plaintiff sues each and all defendants in both their individual and official capacities." *Rollins by Agosta v. Farmer*, 731 F.2d 533, 536 n.3 (8th Cir. 1984).

With respect to the difference between individual-capacity and official-capacity suits, the Eighth Circuit also noted in *Nix* the following

> Generally, individual-capacity suits involve actions taken by governmental agents outside the scope of their official duties. Official-capacity suits typically involve either allegedly unconstitutional state policies or unconstitutional actions taken by state agents possessing final authority over a particular decision.

Nix, 879 F.2d at 431.

Upon a careful review of the complaint, I conclude that it does not meet the test set out in *Wells* because it does not set forth clearly that plaintiff is suing the individual defendants in their individual capacities for damages, not simply in their capacities as state officials. The style of the complaint makes no reference to any individual-capacity lawsuit. The language in ¶ 1.c. of the complaint states that "at all times relevant to this action," the officers were acting in the course of their employment and in furtherance of the business of the city, which suggests an official capacity claim.

It is repeated in ¶ 15 that the officers were acting in the course and scope of their employment by the city, again suggesting an official capacity suit.

There are two sections of the complaint that do suggest an individual capacity suit. Paragraph 11 suggests that the officers in instituting criminal charges against the plaintiff were "acting for themselves and for the city." The *ad damnum* to the complaint seeks compensatory and punitive damages against "each" of the defendants. However, I do not believe that these isolated, indirect references are enough to "set forth clearly in [the] pleading" that the individual defendants are being sued in their individual capacities for damages, as well as in their capacities as state officials.

In light of the foregoing, the motion of defendants Jenkins, McBroom, Fink, Heidle, McCart and Singleton to dismiss any claims against them in their individual capacities [Court File #13] will be granted without prejudice.

Order accordingly.

/s/_____

JAMES H. JARVIS,
UNITED STATES DISTRICT JUDGE

APPENDIX E

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS

42 USCS § 1983 (2001)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
MAY 15 2002
OFFICE OF THE CLERK

No. 01-1132

IN THE
Supreme Court of the United States

DARREN MCBROOM, TERRY FINK, RANDY HEIDLE, VIRGIL MCCARTER, and JERRY SINGLETON,

Petitioners,

v.

RALPH MOORE, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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May 2002

QUESTION PRESENTED

Whether a district court may look to the course of proceedings to determine whether a section 1983 defendant has been given adequate notice that the plaintiff is seeking to hold him liable in his individual capacity.

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STATEMENT OF THE CASE

Factual Background

The complaint alleges the following facts:

On the morning of April 7, 1996, five police officers (Petitioners here) went to Mr. Moore's residence in four separate police cruisers, supposedly to investigate a report that shots had been fired in the neighborhood. Mr. Moore was not at home when the officers arrived. He drove up shortly thereafter in his own car with his wife and his son's 17-year-old girlfriend. At that time, the officers were all out of their cars, in his yard, on his porch, or at his door.

Mr. Moore asked the officers to leave, and the officers refused. He repeated his request several times, and one of the officers told him that if he did not calm down he would be arrested for disorderly conduct. Mr. Moore then said that he was going to go see the mayor about the matter, and he got back into his car. At that point, Mr. Moore was not under arrest and had not violated any law. The officers did not have probable cause to believe that he had committed any offense, nor did they have any legal grounds to confine him or restrict his movements in any way.

Nonetheless, the officers pulled open the driver's side door to Mr. Moore's car, sprayed him in the face with Mace, and dragged him out of the car by his arm. The five officers then beat him viciously, sprayed Mace several more times, and struck him on the head with hard objects.

Following the beating, the officers threw Mr. Moore headfirst into a police cruiser and took him to a hospital. He had seizures on the way and had to remain in the hospital, on oxygen, for more than a day. After Mr. Moore's release from

the hospital, the officers charged him with disorderly conduct, aggravated assault on a police officer, simple assault on a police officer, resisting arrest, and contributing to the delinquency of a minor.

As a result of the beating, Mr. Moore suffered numerous injuries, including permanent impairment of his left arm and permanent injury to his eyes.

Proceedings Below

Mr. Moore filed his complaint on April 4, 1997, alleging that the City of Harriman, the Chief of Police, and five individual police officers had violated his civil rights by arresting him without cause, using excessive and unreasonable force while arresting him, and charging him with criminal offenses without good cause. He alleged violations of his constitutional rights under 42 U.S.C. § 1983 and the Tennessee Constitution, and other state-law claims including assault, battery, false arrest, false imprisonment, abuse of process, and malicious prosecution. R. 1, App. 9.[1]

Aside from Roy Jenkins, the Chief of Police, the style of the complaint listed the individual defendants by name, without designation of their official positions. Paragraph 1 of the complaint, which identified the parties, referred to the police officers as the "individual defendants," as did paragraph 16. Paragraph 11 alleged that "said officers, acting *for themselves* and for the City," acted "with malice" and "violated the

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[1] Citations in the form of "R.#, App. #" refer to the record entry number in the district court and appendix page number of the joint appendix filed in the Sixth Circuit.

plaintiff's civil rights" (emphasis added). Paragraph 14 alleged that the "actions of the said officers were accomplished in concert and in conspiracy with one another." And the prayer for relief requested "compensatory damages *against each of the defendants*" and "punitive damages *against each of the defendants*" (emphasis added).

The City and the individual defendants filed a joint answer. R. 11, App. 14. Ten months later, on January 22, 1992, the individual defendants filed a motion to dismiss on the ground that the complaint did not sufficiently notify them that they were being sued in their individual capacities. R. 13, App. 20. Mr. Moore opposed the motion, arguing that he was suing them in their individual capacities and that the complaint itself showed that he was doing so. On February 27, 1998, the district court nonetheless granted the motion and dismissed all claims against the individual officers. R. 18, App. 35; R. 19, App. 43.

One week later, on March 6, 1998, Mr. Moore moved to amend his complaint to allege more specifically that the individual officers were being sued in their individual capacities. R. 20, App. 22. At the same time, he moved the court to alter or amend its prior order to reflect that his state law causes of action against the individual officers had not been dismissed. R. 22, App. 24. The court denied the motion to amend the complaint, but granted the motion to alter or amend the order. R. 29, App. 44. Accordingly, the section 1983 claim proceeded against the City of Harriman and the state law claims proceeded against both the City and the individual officers.

Defendants later moved for summary judgment on the section 1983 claim against the City and the state law claims pending against the individual defendants. In August 1998, the

district court, without questioning that the officers had severely beaten Mr. Moore, found insufficient evidence that the use of pepper spray and excessive force against Mr. Moore evinced a policy or custom of the City. On that basis, the court granted the motion as to the section 1983 claim and dismissed the case against the City. The court also granted in part and denied in part summary judgment for the officers on the pendent state law claims. R. 44, App. 47; R. 45, App. 60. On February 10, 1999, the court dismissed the remaining state law claims without prejudice to pursuit of those claims in state court. R. 51 Order, App. 61.

Mr. Moore appealed from the dismissal of his claims against the officers in their individual capacities and from the denial of his motion to amend. R. 52, Notice of Appeal, App. 62. The panel reversed. It found that the complaint taken as a whole provided sufficient notice to the individual officers that they were being sued individually. Pet. App. 83a. Having reversed on that ground, the panel did not reach the issue whether the district court had wrongly denied leave to amend. *Id.* 88a.

Petitioners sought en banc review, which the court of appeals granted. 218 F.3d 555 (6th Cir. 2000). On rehearing, the Sixth Circuit agreed that dismissal of the section 1983 claims against the officers had been improper. The court stated that the course of proceedings had provided sufficient notice that the officers were being sued in their individual capacities. Pet. App. 6a & n.1, 8a-9a.[2]

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[2] "The 'course of proceedings' test considers such factors as the nature of the plaintiff's claims, requests for compensatory or (continued...)

Six members of the Sixth Circuit also found that the district court erred in denying leave to amend the complaint to allow Mr. Moore to plead capacity more explicitly. *Id.* 9a-11a. One judge concurred in all but that portion of the opinion; he thought it "unnecessary" to address the amendment issue. *Id.* 11a-12a. Six judges dissented, stating that they would require an express averment of individual capacity and that the motion for leave to amend was properly denied. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

Although the petition purports to present three questions, this case in fact presents only one: whether a district court may look to the course of proceedings to determine whether a section 1983 defendant has been given adequate notice that the plaintiff is seeking to hold him individually liable. Petitioners' first and third questions are different ways of asking that question. Petitioners' second question, which concerns the jurisdictional requirements of the Eleventh Amendment, is not presented by this case, in which neither the state nor any state employee has been a defendant.

As to the one question actually presented, review is unwarranted for three reasons. First, the decision below is consistent with the rule of all the federal courts of appeals

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[2](...continued)
punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. [citation] The test also considers whether subsequent pleadings put the defendant on notice of the capacity in which he or she is sued." Pet. App. 61 n.1.

except for one, the Eighth Circuit. However, the Eighth Circuit's rule regarding amendment of pleadings in this context reflects the course of proceedings approach taken by the other courts of appeal. Thus, although the Eighth Circuit might construe the complaint in this case differently than would the other circuit courts, the outcome in that circuit would be the same, as the court of appeals would grant leave to amend to add an express allegation that the five officers were sued in their individual capacities. Moreover, the Eighth Circuit's rule requiring an express averment of individual capacity is based on Eleventh Amendment concerns not at issue in this suit against municipal defendants. Second, because the court below also indicated that Mr. Moore should have been granted leave to amend his complaint, an independent basis exists on which to affirm the decision below. Petitioners did not seek certiorari on that independent ground. Therefore, a ruling on the pleading issue presented here would likely not affect the outcome of this case. Third, the decision below is correct. The complaint provided ample notice to the officers that they were being sued as individuals, and they suffered no prejudice from the lack of an express averment of capacity.

A. There Is No Conflict Among The Circuits As To The Appropriate Outcome On The Facts Of This Case.

This Court has recognized that the "course of proceedings typically will indicate the nature of the liability sought to be imposed" in cases where "the complaint does not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). *See Bender v. Williamsport Area School District*, 475 U.S. 534, 543 (1986) (defendant lacked standing to appeal in individual capacity where, despite allegation of individual capacity, course of proceedings made clear that action

was against defendant in official capacity); *Brandon v. Holt*, 469 U.S. 464, 469 (1985) (using course of proceedings to determine capacity in which police director was sued). *Cf. Hafer v. Melo*, 502 U.S. 21, 24 n.* (1991) (noting conflict on this issue).

Similarly, all the courts of appeals but one—the Eighth—look to the course of proceedings to determine whether officials are being sued in their official or their personal capacities. Pet. at 9.[3] The Ninth Circuit, although it does not use the term "course of proceedings," looks to the complaint as a whole and presumes that plaintiffs are suing officials in their individual capacities when, as here, the complaint seeks monetary damages. *See Shoshone-Bannock Tribes v. Fish & Games Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.1990) (looking to basis of the claims asserted and nature of the relief sought). The Ninth Circuit's test is entirely consistent with the approach and holding of the Sixth Circuit in construing Mr. Moore's complaint as alleging claims against the officers in their individual capacities.

The one circuit out of step with this Court and the other courts of appeals on this issue is the Eighth Circuit. That circuit applies an irrebuttable presumption that, absent an express statement that suit is brought against officers in their individual capacities, officers are sued solely in their official capacities. *Murphy v. State of Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997). Although the Eighth Circuit's view is inconsistent with

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[3] The First Circuit has not addressed this issue. See *Pieve-Marin v. Combas-Sancho*, 967 F. Supp. 667, 669-70 (D.P.R. 1997) (noting that First Circuit has not addressed issue; using course of proceedings test); *Lewis v. City of Boston*, 829 F. Supp. 471, 476 (D. Mass. 1993) (same).

the approach taken by this Court and the holdings of the other circuits, that inconsistency does not warrant certiorari in this case, for two reasons.

1. Although the Eighth Circuit requires an express averment of individual capacity, its consideration of requests for leave to amend to add such allegations reflects a course of proceedings approach that would result in the same outcome in the majority of cases. For example, in *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989), where the plaintiff sought compensatory and punitive damages against state defendants but did not expressly aver capacity, the court of appeals indicated that leave to amend would be appropriate. *Id.* at 433 n.3. Likewise, in *Murphy*, the court assumed that the district court would have granted leave to amend and, therefore, deemed the complaint amended, where despite the omission of an express allegation of capacity the "defendants had sufficient notice that they were being sued in their personal capacities." 127 F.3d at 755. Conversely, the court has denied leave to amend to add express averments of individual capacity where, for example, the plaintiff had amended the complaint once after a motion to dismiss brought the pleading issue to her attention but had not added capacity allegations at that time. *Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619, 620 (8th Cir. 1995). And in *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (8th Cir. 1998), the court denied leave to amend to aver individual capacity where the plaintiff sought leave for the first time on appeal.

Here, where the complaint as a whole put the officers on notice that the complaint sought individual liability, and where Mr. Moore moved for leave to amend to add express allegations of capacity promptly upon the district court's ruling, the Eighth Circuit would have permitted Mr. Moore to amend his

complaint to add an express averment of individual capacity. Thus, in *every* court of appeals, including the Eighth, the outcome of Mr. Moore's appeal would have been the same.

More generally, the Eighth Circuit's approach to considering requests for leave to amend takes into account the same types of concerns that other courts use to consider whether an individual defendant has been given fair and adequate notice of suit through the course of proceedings. This overlap mitigates the effect of any conflict on the question presented here. Accordingly, review by this Court is unwarranted.

2. In the cases in which the Eighth Circuit developed its rule, the individual defendants were *state* employees. *See Nix*, 879 F.2d at 431; *Egerdahl*, 72 F.3d at 619; *Murphy*, 127 F.3d at 754-55. In adopting its strict rule, the court focused on the jurisdictional limit imposed on suits against states by the Eleventh Amendment. The court looked to Federal Rule of Civil Procedure 9(a), which states:

> Capacity. It is not necessary to aver capacity of the party to sue or to be sued . . . except to the extent required to show the jurisdiction of the court.

The Eighth Circuit construed Rule 9(a) to require a plaintiff to expressly allege individual capacity to demonstrate that the Eleventh Amendment presents no jurisdictional bar to the suit. *Nix*, 879 F.2d at 431. Although more recently the court has applied *Nix* in cases against municipal employees and required an express statement of individual capacity in that situation as well, it has not confronted the state-municipality distinction. *See Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir.

1999) (individual capacity not properly pleaded but, in any event, alleged facts and evidence failed to state § 1983 claim against individuals). The distinction is important, given that the court's reason—whether or not correct—for rejecting the course of proceedings approach turns on Eleventh Amendment concerns that are inapplicable to non-state employees. *See Coleman v. Wirtz*, 745 F. Supp. 434, 441 (N.D. Ohio 1990) (*Nix* not applicable in case against municipal defendant). Upon a closer look, the Eighth Circuit may recognize that the Eleventh Amendment concerns so central to the *Nix* analysis are inapplicable in cases involving municipal employees. Certiorari is therefore premature at this time, as the conflict may resolve itself without this Court's intervention.[4]

B. Because Mr. Moore's Motion For Leave To Amend Presents An Independent Ground For Reversing The District Court's Decision, Resolution Of The Question Presented Would Not Affect The Outcome Of This Case.

The petition should also be denied because the Court's ruling on the question presented will not determine the outcome

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[4] Even as to state employee defendants, the Eighth Circuit's reasoning is wrong. The Eleventh Amendment does not bar section 1983 suits against state employees in either their official or their individual capacities; it simply limits the relief available in official capacity suits to prospective relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex Parte Young*, 209 U.S. 123 (1908). Accordingly, Rule 9(a) does not require an express statement of capacity in such cases. In this case, where the Eleventh Amendment does not even arguably apply, the Eighth Circuit's rule makes even less sense.

of the case. Rather, even if this Court were to adopt the Eighth Circuit's singular view and hold it applicable to municipal employees, on remand Mr. Moore would be granted leave to amend to plead capacity more explicitly.

The petition for rehearing en banc raised only the pleading issue, not the issue whether the district court should have granted leave to amend. Although a remand after a ruling on the pleading question here would, as formal matter, return the case first to the Sixth Circuit sitting en banc, *see, e.g.*, *Donahey v. Bogle*, 16 Fed. Appx. 283 (6th Cir. 2000) (remand for reconsideration from Supreme Court returned case to en banc court), the en banc court would likely return the case to the panel for reconsideration of the amendment issue, on which en banc rehearing was neither sought nor granted. *See Marathon Oil Co. v. A.G. Ruhrgas*, 182 F.3d 291 (5th Cir. 1999) (remanding to panel after remand from Supreme Court to en banc court); *see also* 6th Cir. Internal Operating Procedure 104 (remand from Supreme Court goes to original panel).

Two of the three panel judges have already agreed, at the en banc stage, that the district court abused its discretion in denying Mr. Moore leave to amend his complaint to make explicit that he was suing the officers in their individual capacities. Pet. App. 9a-11a. (The panel had not reached the issue whether denial of leave to amend was proper. Pet. App. 88a.) And Petitioners have not sought certiorari on the issue of leave to amend. If this Court were to grant certiorari and hold that Mr. Moore did not adequately plead capacity, on remand the panel would almost certainly permit Mr. Moore to amend his complaint to correct that deficiency. The Court's opinion here would therefore serve only as an advisory opinion.

In the unlikely event that the Sixth Circuit chose to decide the amendment issue en banc, the most probable outcome, again, would be to allow Mr. Moore to amend, thereby rendering this Court's decision purely advisory. Six members of the Sixth Circuit have agreed that Mr. Moore is entitled to amend, and six have disagreed. In his concurring opinion below, Judge Merritt did not express any view on the amendment issue, stating that to address that point was "unnecessary." Pet App. 12a. Because Judge Merritt concurred in the holding that Mr. Moore had given the officers fair and adequate notice that individual liability was at issue, he would likely agree that "justice . . . require[d]" leave to amend. Fed. R. Civ. P. 15(a). Moreover, the only concern that Judge Merritt expressed about the substance of the opinion of the six judges who favored leave to amend related to state employee defendants, not municipal employee defendants such as Petitioners. Pet App. 12a.

Thus, whether on remand from this Court the remaining issue in this case were decided by the original panel or by the Sixth Circuit sitting en banc, Mr. Moore would almost surely win on an alternate ground. Because a decision on the question presented would therefore not affect the outcome of the case, the petition for a writ of certiorari should be denied.

C. The Decision Below Is Correct.

Finally, the petition should be denied because the decision below is correct. The complaint made clear that Mr. Moore was suing the officers in their individual capacities. It included state law claims that were properly pleaded to allege claims against the officers individually. R. 29, App. 45-46 (order). It requested compensatory and punitive damages "against each of the defendants," although neither form of

damages would be available against the officer defendants in their official capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Punitive damages would be unavailable against the City as well, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and, therefore, could only have been sought from the officers in their individual capacities. Those aspects of the complaint, along with the facts that the caption did not include any designation of official capacity and that the complaint referred to the five officers as "individual defendants" and alleged that they had acted "*for themselves* and for the City," left no room for doubt that the complaint sought relief against the officers individually. In fact, Petitioners' motion to dismiss did not state that the officers did not understand that Mr. Moore sought damages from them, only that the complaint had not properly pleaded capacity under their reading of the Sixth Circuit case law. *See* R.14 (Memo in Supp. of Motion to Dismiss, 2/19/98). As this Court has stated, "it is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity." *Hafer v. Melo*, 502 U.S. at 24 n.* But viewing the complaint as a whole, not to mention the subsequent proceedings in the case, there was no ambiguity.

Accordingly, Petitioners' policy arguments are misplaced; none applies in this case. For instance, Petitioners suggest that the lack of an express averment of individual capacity prejudiced them because, as a result, they "did not file individual answers, did not hire independent counsel, [and] did not participate in settlement negotiations." Pet. 12. Yet Mr. Moore had properly pleaded individual capacity as to the state-law claims, which were based on the same facts as the section 1983 claim. And all of the state claims were still in the case when the officers raised the pleading issue, at which point Mr. Moore made crystal clear that he sought to hold each of them personally liable under section 1983. Thus, even if the officers

had truly not understood the section 1983 claim to be directed at them in their personal capacities up to that point, their decision to forgo individual representation and participation was a choice they made *knowing* that they might be held personally liable under state law for the beating and injury they inflicted on Mr. Moore.

For the same reason, Petitioners' claim that they were prejudiced because they did not know to raise the defense of qualified immunity, and thus did not get the advantage of an early exit from the case, is without merit. Pet. 12. Even had they successfully invoked qualified immunity early in the litigation, the existence of the state law claims would have precluded them from avoiding the burdens of litigation. Moreover, Petitioners' motion to dismiss itself made clear that the officers were aware that individual liability was a potential issue in the case. Nothing stopped them from moving in the alternative for dismissal on qualified immunity grounds, if any basis for qualified immunity existed in a case where the complaint alleged that the individual defendants viciously beat the plaintiff without provocation. In fact, however, a claim to qualified immunity would have been frivolous. *See Graham v. Connor*, 490 U.S. 386 (1989); *Pray v. City of Sandusky*, 49 F.3d 1154, 1158-59 (6th Cir. 1995); *Adams v. Metiva*, 31 F.3d 375, 385 (6th Cir. 1994).

Moreover, the plain terms of Rule 9(a) foreclose a requirement of pleading capacity in cases, such as this one, where there is no possible Eleventh Amendment jurisdiction issue. A "court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction . . . ." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1206, p. 91 (2d ed. 1990) (discussing Rule 8(a)(1)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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